Supreme Court, U.S.
FILED
06-737 NOV 22 2006
OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

THE ESTATE OF LESLIE HARRISON CLEM, JR.,
Deceased, by and through Administrator,
Leslie Clem, Sr., et al.,

Petitioners,

v.

WESTERN HERITAGE INSURANCE COMPANY,
a foreign insurer,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

At a fundamental level, there's obviously no material distinction between that which occurs when *one* court insists on enforcing a law that is constitutionally infirm, and when *another* fails to apply a thoroughly valid, controlling law. That is, while both are properly described as error, they also represent a basic denial of due process.

While *State Farm Mutual Automobile Insurance Company vs. Campbell,* 538 US 408 (2003) fits the former pattern, this case presents error of the latter description. As will also be seen, the errors committed here are no less apparent, no less grievous and are attended by the very same considerations deemed sufficient to warrant review in *Campbell*. Indeed, the only discernible differences between this case and *Campbell* are that the insurer involved is the *beneficiary* (rather than the party aggrieved) of those errors, and the Petitioners are merely a single private citizen, both individually and as fiduciary for the estates of his deceased wife and son. In a larger sense, then, the critical, underlying question is whether recourse to this Court, and respecting comparable civil grievances, remains equally available in both instances.

STATEMENT OF QUESTIONS PRESENTED

1. Did the Sixth Circuit err, and deny due process to the Petitioners, by upholding the District Court's grant of summary judgment to the Respondent, and to the effect that the insurer's liability policy, which indisputably extended liability coverage to injuries sustained while merely traveling to or from a special event, was **inapplicable** to fatal injuries sustained by a 15-year-old parade participant **after** completing the prescribed and permitted event route; exiting it's terminus; and while merely traveling elsewhere, in a different direction, over another street open to regular traffic, and with no intent to return?

PARTIES

Petitioners are Leslie Clem, Sr., both individually and as personal representative of the Estates of Leslie Clem, Jr. and Janet Hall Clem, both deceased.

The Respondent is Western Heritage Insurance Company. Though undisclosed in the Respondent's corporate disclosure below, it is Petitioners' present understanding that the Respondent is a subsidiary of Nationwide Insurance Company.

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OPINIONS BELOW

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BASIS FOR JURISDICTION IN THIS COURT

The decision of the United States Court of Appeals for the Sixth Circuit was entered on August 10, 2006, and the Order denying Petitioners' timely filed Petition for Rehearing was entered and filed on August 29, 2006.

This Petition for Writ of Certiorari is being filed within ninety (90) days of the date of the Court of Appeals' denial of the Petitioners' timely Petition for Rehearing. 28 USC 2101 (C). Revised Supreme Court Rule 13.3.

The jurisdiction of this court is invoked pursuant to the provisions of 28 USC 1254 (1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS IMPLICATED BY THIS PETITION

UNITED STATES CONSTITUTION AMENDMENT V

> No person shall be... deprived of life, liberty or property, without due process of law...
>
> *U.S. Constitution, amend. V*

> (1) All insurance policies, subject to the provisions of KRS 304.14-420 to 304.14-450, shall be written in language easily readable and understandable by a person of average intelligence and education.
>
> *KRS 304.14-440*

STATEMENT OF THE CASE

In October, 2001, the Jessamine County (Kentucky) Chamber of Commerce (hereinafter "Chamber") sponsored a multi-event festival denominated as the "Jessamine Jamboree". Prior to doing so, the Chamber acquired a policy of commercial general liability insurance (CGL) from the Respondent, Western Heritage Insurance Company (hereinafter "Western"). In pertinent part, that policy extended to the Chamber a broad grant of liability coverage for bodily injury, occurring, at least, anywhere within the United States. While that grant of coverage was certainly subject to an array of exclusions, only one of them became relevant and the center of dispute in the instant case. *Apx. p. 69a, 71a-72a, 77a.*

Among the Jamboree's events was a parade to be conducted in Nicholasville, the county seat, and denominated as the "Parade on Main". As restricted by permit, specified in an array of published pamphlets and public announcements, and indicated by its very name, this event was confined to a specified section of Main Street (and, of course, with a concommitant suspension of regular, public traffic within the prescribed area). More particularly, the parade was to begin on North Main in front of the local McDonald's, and *end* at the corner of South Main and Kimberly Drive (representing the southern boundary of the property occupied by Kroger). *Id., p. 47a-50a, attachments thereto.*

Included among the parade entries was a "float" (but actually consisting of a tractor-trailer combo). Originally intended to honor and carry the football team and cheerleading squad from West Jessamine High School, this entry ultimately carried the cheerleaders from West Jessamine Middle School, as well. Among the occupants on the trailer

(some 60-80 in number) was a 15-year-old freshman named Les Clem, Jr. *CA Apx., 129-39,195-98.* [1]

On the morning of the parade, students and coaches (informed only, in advance, to "look for" the "float" in the vicinity of the parade starting point) found and met both driver and vehicle in the parking lot of a defunct, Winn-Dixie store, located across North Main from McDonald's. *Id., p. 201-03, 134.* Once loaded, the vehicle entered the parade on North Main, and proceeded south. At intervals, it would stop; students would climb off; and then conduct cheers and other demonstrations of school spirit so as to impress the parade judges (located roughly at the midpoint of the parade route) and entertain the audience along the way. *Id., p. 203-07, 209, 258.* Eventually, they reached the corner of Main and Kimberly, and representing the terminus of the parade. Presented, at least, with the choice of either proceeding further south (and over those portions of Main Street, remaining open to public traffic), or westward by way of Kimberly Drive (also open to public use), the driver chose the latter. Both of the two cheerleading coaches aboard (one of which was Les Jr.'s mother) later testified that as far as they were concerned, this exit from the parade's prescribed terminus had brought their participation in the event to an end. *Id., p. 182, 203-07.*

It is undisputed that as the vehicle and its occupants proceeded westward on Kimberly Drive, an accident

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[1] For reasons unknown to these Petitioners, the Sixth Circuit opinion states that "(T)he students were required to sign an entry form that included a 'release of responsibility' clause." *Apx. p. 5a.* In fact, there is not a shred of evidence that such an instrument was ever executed by **any** student; anyone on their behalf; or that any request was made that they do so.

occurred, resulting in fatal injuries to Les Jr..[2] Likewise, it is undisputed that this accident occurred at a location between 179 and 181 feet west of Main Street. *Id.,p. 129-30,210-11; Apx.p. 51a-58a.* In short, the vehicle, victim and other occupants had completed the prescribed parade route; exited its terminus; and simply proceeded elsewhere, as a portion of ordinary traffic and over another street open for such use.

Informed of the loss and the Chamber's potential exposure, Western promptly denied coverage and on the basis of a "participant" exclusion contained in its policy.[3] Shortly thereafter, Les Jr.'s estate and his surviving parents instituted a civil action in state Circuit Court against the Chamber and a number of other defendants. *CA Apx.,p. 269 - 71, 153, 156 - 7.* Notified of the pending litigation against it's insured, Western again denied coverage (and refused to defend), on the same basis previously enunciated.[4] The Chamber

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[2] The Sixth Circuit opinion below endeavors to provide additional detail regarding the particulars of that accident, and more specifically, respecting Les Jr.'s actions. Because we are accorded only limited space and this portion of the opinion appears to have no significance to either the rulings below or the question presented here, we will not attempt to explain all of the problems with this account. Instead, it is sufficient to note that this portion of the opinion was based purely on an unsworn police report; that such material is not competent for summary judgment proceedings [*Coates vs. Kasczynski*, 2005 US District, Lexis 34217 (W.D.N.Mich., 2005); and, likewise, unfit for consideration in a de novo review of such a disposition.

[3] As appearing in and quoted more extensively in the Sixth Circuits' Opinion (*Apx. p. 14a*), the salient portions of that exclusion specifically negated coverage for bodily injury "to any person **while** *practicing for or participating in* any contest, demonstration, event, exhibition, race or show" (*emph..ital.add.)*

[4] It remains unclear whether these early denials of coverage were issued by Western **without** first determining that the deceased child had been

accordingly undertook its own defense, through its own counsel, and incurred approximately $12,000 in legal expenses over the following year. *Id., p. 273, 570-89; Apx. p. 47a-50a.* At this later point, however, a settlement, compromising the claims against the Chamber, was reached.

While this agreement certainly speaks for itself, its central features can be summarized here. On the one hand, the settlement provided for substantial sums of money respecting the various claims asserted; retention of the Plaintiffs' claims against the other defendants named; and an assignment of *whatever* rights of recourse, contractual or otherwise, that the Chamber might have against Western. In exchange, the agreement extended to the Chamber a "covenant not to enforce" respecting its recited monetary obligations under that agreement, and a commitment that if the Plaintiffs succeeded (by way of the received assignment), in recovering from Western the defense expenses incurred by the Chamber, those amounts would then be remitted to the latter. Lastly, the agreement contained "release" language, but specifically exempting from its reach, the various rights and obligations set forth therein. The claims being so compromised, an Agreed Order was entered, dismissing same with prejudice. *Apx. p. 84a-86a.*[5]

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injured after exiting the parade, or **in spite of** doing so.

[5] The Opinion by the Sixth Circuit characterizes the settlement as "illusory" (and based on the presence of the "covenant not to enforce."). *Apx. p. 6a.* While it's unclear whether that description was being used in a pejorative sense, we want to make certain that this Court is *not* left with the misapprehension that this material (or that provision in the agreement) denotes some valid, *alternative* basis for the decisions below.

In the years since this Court's seminal decision in *St. Louis Dressed Beef & Provision Company vs. Maryland Casualty Co.*, 201 US 173 (1906), and

recognizing the rights of an aggrieved insured against a liability insurer-in-breach, much has occurred in the further development of the principles expressed therein, and reflected in the various, evolving approaches adopted by the several states. Most (including Kentucky's)begin with the same, central proposition enunciated in *Dressed Beef*: that an insurer which so abandons its insured *cannot* avoid liability for the resulting settlement or judgment respecting the underlying claim by way of standard, "prohibitory" policy provisions (those demanding continuing "cooperation" from the insured; precluding "unauthorized settlement"; or requiring either the entry of a "judgment" or determination of the insured's "legal liability"). *Dressed Beef*, at p.182. Consistent with this, the modern rule in Kentucky is simple and straightforward, restricting the insurer's viable defenses, in such instances, to its claimed lack of coverage, or a showing of outright fraud or collusion. *Medical Protective Ins. Co. of Ft. Wayne, Ind. vs. Davis,* 581 SW2d 25, 27 (Ky.App., 1978); *Cincinnati Ins. Co. vs. Vance*, 730 SW2nd 521, 522- 23 (Ky., 1987). [As may also assist this Court's understanding, some states (including Western's home state of Arizona), take a somewhat different approach, at least in those instances where the insurer has erroneously refused to confirm coverage, but tendered a defense to the insured "under reservation". In such instances, the insurer's liability for the underlying settlement is further conditioned on a determination respecting the "reasonableness" (and possible adjustment) of the financial terms of that agreement. Where, however, the insurer (as here) has denied coverage and fully refused to defend, its defenses are just as limited in Arizona as they are in Kentucky: to a lack of coverage, or a showing of fraud or collusion. *Parking Concepts, Inc. vs. Tenney*, 207 Ariz. 19, 803 P3d 19, 22 at note 3 (Ariz., oh no 2004)]

Implicit in this is the acknowledgment of the obvious: that merely acknowledging the *right* of an aggrieved, abandoned insured to settle such a claim will be meaningless *if*, and on the basis of such prohibitory clauses, such agreements remain unenforceable against the offending insurer. This recognition, in turn, has led to another: that the *same* is true if such settlements must (from the standpoint of the insured) take on the earmarks of a suicide pact, i.e., requiring that insured to satisfy the monetary terms of such a settlement, while the coverage dispute with the insurer remains unresolved. Accordingly, just as most states also recognize the right of

Some months later, and following both the death of Les Jr.'s mother and a refusal by Western to satisfy the settlement, this action was filed, but promptly removed by Western from the Jessamine Circuit Court (on diversity grounds) to the United States District Court for the Eastern District of Kentucky. *CA Apx.,p. 6-8, 14-19.* Western's response (both original and as amended) interposed a general denial of liability under the terms of its policy. Significantly, however (see fn.6, infra), Western interposed no affirmative defense of fraud or collusion. *Id., p. 120-28.*

These opposing positions were quickly presented in great detail, and by way of multiple memoranda tendered in support of cross motions for summary judgment. *District Ct. Docket Items 6-10, 14.* Reduced to "bare bones" here, Plaintiffs' position was that while Western's exclusion certainly negated coverage for injuries sustained while **practicing for or participating in** an event, these very limitations on the scope of that provision merely served to reconfirm and emphasize Western's *remaining* obligations under its insuring clause. More particularly, those respecting injuries sustained, as *here*, while merely **traveling to or from** such an event. Given those coverage obligations (and, again, the *absence* of any

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such an insured to "assign his rights" to the adverse party [*Eyler vs. Nationwide Mut. Fire Ins. Co.*, 824 SW2nd 855, 856-57 (Ky., 1992)], they further recognize the legitimacy of a companion, "covenant not to enforce" in favor of that insured.[Kentucky's endorsement of this latter proposition is made clear by the intermediate, appellate opinion under review in *Vance*, made of record hereinbelow (*CA Apx., p. 281, 285*) and provided to this Court at *Apx. p. 59a-62a*. Very simply (and which Western has never disputed), it makes no sense to suggest that the decision by the *Supreme* Court of Kentucky in *Vance* was utilized as a vehicle by which to enunciate a rule applicable to every case, *except* the one then under review. Quite plainly, such a "covenant" is *not* an obstacle to enforcement against an insurer-in-breach.]

claim of fraud or collusion), the District Court had nothing to do but grant partial summary judgment to Plaintiffs/Petitioners, enforcing the settlement against Western (and granting appropriate, prejudgment interest on the settlement amounts prescribed). Western's opposing position, again, consisted purely of an insistence that the decedent's travel beyond the parade terminus should **itself** (at least in this instance) be deemed as additional "participation" in that event. No authority in support of that broadened interpretation was offered. *Id.* [6]

Nevertheless, the trial Court deemed the "participant" exclusion applicable; granted summary judgment to Western on that basis; and likewise overruled Petitioners' motion for post judgment relief. *Apx., p. 17a-40a.* On appeal by Petitioners to the Sixth Circuit, the same decisional pattern was repeated, consisting of an opinion affirming and a subsequent order overruling Petitioners' request for rehearing. *Id., p. 1a-16a.* Both Courts expressed the same, essential rationale, though explained in varying terms and (like Western's arguments to the same effect) without a single cited precedent in support. Though discussed in greater detail below, that rationale was composed of two propositions:

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[6] For completeness' sake, we further acknowledge that at various times, Western has presented a smorgasbord of other arguments, as well. Some, however, were either quickly withdrawn or presented for the first time during appeal. As for the remainder, these consisted of efforts to seek protection behind the various " prohibitive" clauses in its policy; argue the underlying merits; *or* to transplant the "reasonableness" standard recognized in its home state of Arizona (*and*, in this last regard, obtain its application where, quite plainly, no defense "under reservation" had been provided). *Id., Docket Item 6, 10; Respondent's Brief on Appeal, p. 25-33, 36-39.* Thus (and as explained in fn.5, *infra*), those defenses were simply facially without merit; have not served as the basis for decision by either of the Courts below; and require no further discussion here.

1) that the exclusion is "unambiguous", **and** 2) that "participation" should be defined (at least for purposes of the instant case) as encompassing *any* occupancy of a vehicle, denominated as a "float"; no matter *where* that vehicle might be; and pending "debarking" by the occupants (or an "opportunity" to do so). *Id., p. 14a-16a, 35a.*[7]

This petition for relief has followed.

REASONS FOR GRANTING THE WRIT

I. The Policy Considerations Presented Here More Than Satisfy Those Previously Deemed Sufficient by This Court

As noted at the outset, this Court granted the petition in *Campbell* so as to address and correct what it deemed to be errors committed by Utah's highest Court. Those errors, as identified by this Court, did not consist of a failure to apply existing state law, but of applying a state law which *this* Court then deemed offensive to principles of due process. *Campbell*, at 418, *et seq.* That intervention appears to have been based on a conviction that the errors addressed were patent; of significant impact on the aggrieved insurer; likely, if not addressed, to be repeated elsewhere; or any combination thereof. Similarly, it appears that those same considerations would have been equally compelling had those same errors been committed, instead, by one of the lower Federal Courts, sitting in diversity.

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[7] As will be explained below, the decisions by both of the lower Courts may be alternatively interpreted as endorsing the selected construction for either (1) *consistent* application to *all* events (and participants therein) to which the exclusion is addressed, *or* (2) only *selective* use and as to *particular* circumstances. As will also be explained, however, it is the position of the Petitioners that the errors attendant to *either* such reading are both obvious and of a magnitude that cannot be overstated.

As further noted, however, there's no material distinction to be drawn between an error of the type committed in *Campbell*, and that which occurs when, as here, a court fails to apply *valid*, controlling state law. Each such error, and in the most fundamental sense, effects a denial of the most basic right promised by our judicial system to those whom it serves: a faithful application of the same law that our citizens are expected to follow. *U.S. Constitution, amend.V.* Nor may the errors committed in *this case* be regarded as any less prejudicial; mistaken as "harmless"; or dismissed as a proper exercise of "judicial discretion.". Confronted with a central question of law, as to the meaning of an insurance policy, both of the lower courts decided that issue adversely to the Petitioners and *dispositive* of the matters presented. As will also be made clear, insofar as this Court considered the errors in *Campbell* to be obvious and easily resolved (more specifically, as "neither close nor difficult", *Campbell*, at 418), those committed *here* are even more so.

Further, we have no difficulty in acknowledging that the $145 million judgment in *Campbell* would be expected to have a tangible, adverse impact even on a national insurer, such as the petitioner therein, and even though the reported assets of that particular insurer, during that period, exceeded $75 billion. State Farm Mutual Automobile Insurance Company, 2003 Annual Report. However, the rulings below, in *this* case, and effectively rendering a substantial, underlying settlement utterly unenforceable, can and should be recognized as having an equal (if not *greater*) impact on a widowed, private citizen, attempting to rear and educate his remaining children (and who, themselves, are also statutory beneficiaries of their mother's estate).

Likewise, we also have no quarrel with this Court's apparent recognition, in *Campbell*, that if left uncorrected, the errors therein were likely to be repeated, *or* what such

recognition should also imply: that there is no social utility (and, instead, an obvious, basic unfairness) in refusing to address such matters until some future occasion; provide the benefit of that review to some *other* aggrieved litigant; but leaving the petitioning insurer in *Campbell* to suffer the consequences of identical errors. However, it's also appropriate to note *here* that "participant" exclusions, in its various forms, are to be found in virtually every policy of general liability insurance purchased by entities and organizations, public and private, which undertake to organize, sponsor or conduct special events. Thus, their potential application (proper or improper) presents itself respecting every special event, large or small, ranging from professional sports contests, musical concerts and organized assemblies, down to every high school prom, local festival, spelling bee or fund-raising bazaar, conducted by small parish churches. At the same time, the interpretation of insurance policies (and coverage exclusions, in particular) is *not* a subject determinable by way of judicial discretion *or* subjected to rules of construction that vary significantly from state to state. To the contrary, virtually *every* jurisdiction recognizes the same, well-established, strict rules of construction that were violated, in every conceivable way, *here*.

In short, the likelihood of a duplication of the errors committed here is no less than that presented in *Campbell*. The decisions below have, quite literally, expanded the reach of a common exclusion so as to put in significant doubt even the limited protection afforded those insured under policies containing similar exclusions. Just as the loss here involved the death of a child, the prospects of an expanded, *uninsured* exposure to liability can only have an adverse, chilling impact on those otherwise inclined to sponsor the various special events that have become an important part of American life.

Further, citation is not required in order to state the purposes of diversity jurisdiction, recognized from its inception. Very simply, diversity jurisdiction was *not* created as a means by which to evade the faithful application of controlling state law, but to *assure* that application (and by insulating a nonresident litigant from feared, local prejudice that might otherwise interfere). In short, *this* form of "forum shopping" has been legally sanctioned, but only for the laudatory purposed noted. Thus, in those unfortunate instances where, as here, the exercise of such jurisdiction has culminated in a patent *failure* to apply governing state law, it is critical that this Court's corrective intervention be available to the aggrieved litigant. Put another way, nothing *positive* is to be achieved by way of a response which, however intended, bolsters the view that no matter how egregious the error may be, this Court's corrective intervention (and respecting an entire specie of civil cases) may be confidently excluded as an expected consequence of such error.

Ultimately, then, what lies below the surface of the issue formally enunciated hereinabove are matters far more fundamental, and critical to both the mission of our Federal Courts and public confidence in those institutions. That is, when the Federal bench has been touted as this country's best and brightest, and "vetted" through a rigorous screening and appointment process, the public has *every* right to expect jurisprudence at its highest level. Conversely, even mentioning the exalted status of that bench *or* the lofty purposes of diversity jurisdiction can only leave the taste of ashes in one's mouth when the most patent of errors not only occurs in that setting, but is then duplicated at the circuit level and, finally, deemed unworthy of this Court's attention. Attorneys, by universal ethical rule, are charged with the duty of both maintaining an understanding of existing law, and to so advise their clients, as well. Likewise, the very public at

large is expected to follow that rule of law in their daily endeavors. Those requirements, however, derive their very legitimacy from an expectation that is even more fundamental: that this very *same* law *will be* faithfully applied by their Courts.

Again, it's quite clear, from *Campbell*, that this court *will* intervene, where what it perceives to be a clear, patent error, significant in its immediate impact and amenable to duplication elsewhere, has been imposed on a major, aggrieved insurer. This, certainly, is all well and good. Here, however, the errors below *more* than fit that same description in every respect, with the profile differentiating only in that it is *not* an insurer so aggrieved, but a private citizen (and, ironically, with such an insurer serving as the *beneficiary* of those errors). The question, then, is whether that intervention is equally available in *both* such instances.

II. The Errors Below Are Themselves of a Fundamentally Egregious and Patent Character

Throughout this litigation, Petitioners have urged that Western's exclusion must be interpreted in accord with that which is commonly understood: that once participation in a given event *is* routinely recognized as having *ended*, at *least* at the point when (or where) he has clearly exited its identifiable boundaries; is merely traveling elsewhere; and with no intention to return. *Rejecting* that proposition, the lower Courts instead adopted the notion that where travel both *during* an event and *afterward* are uninterrupted and accomplished by the same vehicular means, such "participation" is continuous throughout.

To understand the multifaceted (and colossal) error in this "choice", one must begin with two propositions that are beyond debate. First, that both the meaning *and* the application of Western's exclusion to the undisputed facts

presented are questions of *law*. *Kemper Nat'l. Ins. Co. vs. Heaven Hill Distilleries, Inc.*, 32 SW3rd 869, 871 (Ky., 2002). Secondly, that a court making those determinations is *not* accorded either free choice in doing so *or* in selecting the criteria to be used in making that determination. To the contrary (and so as to achieve uniformity from case to case), *those* determinations are governed by strict rules of construction, which serve to compel a single outcome. As will be seen, the rulings below are not only unprecedented, but could not possibly be any more incompatible with established authority.[8]

Kentucky's first rule of construction is that just as insurance policies sold in the state must be drawn in terms understandable to the average person, they are also to be accorded a meaning consistent with ordinary, lay usage. KRS 304.14-440(1); *City of Louisville vs. McDonald*, 819 SW2nd 319, 320 (Ky., 1991). A fuller statement of the rule also recognizes and addresses the reality that even in ordinary parlance, certain words and phrases may be given differing usages, and, certainly, that one or more of those usages would necessarily produce the absurd if used to define the terms of an insurance provision. Thus, while this fuller statement understandably proscribes the adoption of a

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[8] By rule, this Court requires a Petitioner to specify where its claim of error was preserved below. In this instance, it would be far more difficult to find instances in which the arguments presented here were not asserted below. Indeed, Petitioners' position is to be found in multiple memoranda provided to the District Court [*Dist. Ct. Docket Item 6 (Memorandum of Law in Support of Motion for Partial Summary Judgment, p. 10-14); Item 8 (Plaintiffs' Response in Reply, p. 10-13); Item 14 (Supplemental Response, p.1-3); Item 20 (Memorandum in Support of Motion for Post Judgment Relief, p. 2- 13); Item 22 (Plaintiffs' Reply, p. 1-3)*], and detailed in Petitioners principal Brief on Appeal (p.22-62) and Reply Brief (p.4-15).

construction that produces the ridiculous, it also mandates specific guidelines respecting the choice between alternative, seemingly serviceable meanings. Generally stated, those guidelines require the selection of that usage which is most favorable to the insured. More specifically, *insuring clauses* are to be *broadly* read, while policy *exclusions* are to be *narrowly* circumscribed. *St. Paul Fire & Marine Ins. Co. vs. Powell-Walton- Milward, Inc.*, 870 SW2nd 223, 226 (Ky., 1994); *Eyler vs. Nationwide Mut. Fire Ins. Co.*, 824 SW2nd 855, 859 (Ky., 1992).

As may first be noted, merely deeming an insurance provision "unambiguous" is *not* license by which to adopt a construction that is divorced from lay, common usage; *that* deviation is only permitted where compelled by a definition appearing in the text or adopted by reference, say, to statute. Further, it is equally clear that these rules serve to eliminate the discretion by which to select one of several meanings available, and merely on the basis of what seems most convenient to a result otherwise desired. Instead, a court is compelled to adopt that reading which is most favorable to the insured, and the Kentucky Courts have been quite clear in acknowledging the "bias" implicit in these rules: as deliberately designed to restrict, where possible, the reach of policy exclusions, and thus *maximize* the scope of insurance protection purchased. *Eyler*, at 859.

Within this framework, one may now analyze Western's exclusion, the rulings below and do so, along the way, in light of other rules of construction, equally recognized, as well.

"Participant" exclusions, while in common use today, vary in their breadth. For instance, the exclusion in *Daniel vs. City of Morgantown*, 125 N.C.App. 47, 51 (N. C. App., 1997) was drawn so as to negate coverage only for bodily injury sustained "while practicing for or participating in any

sports or athletic contest or exhibition". Likewise, the exclusion in *Twin Cities Fire Ins. vs. Delaware Racing Assn.*, 848 A2d 624, (Del., 2003), was even more circumscribed, containing similar, exclusionary language, but referenced and keyed to a "schedule" of *particular* "sports or athletic" activities to which it would apply. That "schedule", however, mentioned only "horseracing", and thus limited the reach of that exclusion to a *single* form of such activity. In contrast, the exclusion in *American Casualty vs. Krieger* 181F.3d 1113 (9th Cir., 1999), was drawn to have a greater breadth, at least in one respect (and particularly significant *here*), than either of those just mentioned. That is, the *Krieger* exclusion expressly negated coverage for injuries sustained "while rehearsing or practicing for, participating in *or traveling to or from* any sports or athletic event." *Krieger*, at 1135.

Western's exclusion, at issue *here*, is certainly broader, in one sense, than the exclusion in *Krieger*, but narrower in another. That is, Western's exclusion negates coverage for injuries sustained "while practicing for or participating in *any contest, demonstration, event, exhibition or show...*" Thus, the contemplated application of this exclusion extends *beyond* mere "athletic or sports" events. On the other hand, however, Western's exclusion does *not* extend itself to injuries sustained while merely "traveling to or from" the events otherwise addressed in its text. While this is obvious from the text (*and* comparison to the *Krieger* exclusion), such a reading is also mandated under Kentucky law. That is, inasmuch as it is a "simple matter" for an insurer to include such additional wording, so as to expand the exclusion's reach, the *omission* of such language denotes a clear intent to provide *coverage* in such instances. *St. Paul*, at 227; *Staples vs. Southern Fire & Cas. Co.*, 289 SW2nd 512, 515 (Ky., 1956).

As should also be evident, then, the reach of Western's exclusion cannot be so extended by the transparent device of merely recharacterizing such travel to or from an event as "participation" therein. Plainly, this is merely the equivalent of recharacterizing "white" as a "lighter shade" of *black*, and a blatant perversion of the ordinary meaning of such words. While much more is to be said, an obvious problem emerges, even at this early point, respecting the rulings below. That is, it's elementary that *whatever* constitutes "participating in" an event, cannot constitute "*traveling to or from*" that event. Thus, any expansion of the meaning accorded to the former language requires a corresponding constriction in the meaning accorded to the latter. Thus, the Courts below have effectively ruled (consciously or otherwise) that even though *this* child had plainly exited the parade terminus and was merely traveling in a different direction and over a street both *outside* the parade boundaries and *open* to public traffic, *this* conduct would lie *outside* the "ordinary meaning" to be accorded the additional wording appearing in the *Krieger* exclusion (and specifically *drawn* to address injuries sustained during such travel). This absurdity, of course, can be easily converted into a simple (but telling), hypothetical question: that is, *if* Western's exclusion had *not* been drawn so as to negate coverage respecting injuries sustained "while practicing for or participating in" an event, and *instead* to exclude coverage *only* for those sustained "*while traveling to or from*" such events, is it to be seriously suggested that this *altered* exclusion would have been *inapplicable* **here**?

Again, and returning to the text of that exclusion, it's also quite clear that this provision has equal application in reference, say, to both a raucous "tractor pull" and an opera. Conversely, however, it also has no *greater* or broader application in one instance than in the other. While this is clear from the very terms of that exclusion, such a reading is

also compelled by Kentucky law. That is, it's not at all unusual for a given policy provision to be drawn so as to initially extend its reach to a multitude of circumstances, but only to then be qualified by *further* language (again, either appearing in the text or adopted by direct reference to statute, etc.), which clearly requires that *certain* of those circumstances be treated *differently* than the others generally addressed. Where such exempting language appears, it is, of course (and consistent with the "plain meaning" rule), to be fully enforced. *State Farm Mut. Auto.Ins.Co. vs. Kentucky Farm Bureau Mut. Ins. Co.*, 671 SW2nd 258, 259 (Ky., 1984). Conversely, however, where (as here) such exempting language is *absent*, that provision is to be properly construed as demanding a *consistent* application to all of the circumstances to which it is addressed. To conclude otherwise is to introduce conditions respecting coverage into the text that have been completely undisclosed to the insured. Not only is this improper, but particularly so respecting policy *exclusions*. As Kentucky's Courts (and many others) have stated, the expectation of coverage created by an *insuring clause* may only be diluted or countermanded by "an equivocal, conspicuous, plain and clear manifestation" to the contrary. *Simon vs. Continental Ins. Co.*, 724 SW2nd 210, 211 (Ky., 1987). By definition, there is *nothing* "conspicuous", "plain" *or* "clear" about conditions restricting coverage, but which appears *nowhere* in the text of a policy.[9]

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[9] There are, of course, additional problems that emerge when the effort to graft undisclosed conditions onto a policy provision, requiring consistent application to multiple circumstance, is one which also effects an *inconsistent* application of that provision. By definition, such distortion unavoidably presupposes that the provision is amenable to multiple readings, and transforming any contemplated or express declaration of "unambiguity" into a *falsity*. At the same time, however, this last also transforms such a mistaken exercise into a fools errand. That is, *if* the

It is in this context, then, that one may completely understand the full (and rather mind-boggling) implication to be drawn from the rulings below, declaring Western's exclusion to be "unambiguous"; adopting the construction chosen; and *rejecting* the construction proposed by Petitioners. Plainly, the lower courts did not merely endorse the construction chosen, but simultaneously endorsed an additional proposition which can only be described as both extraordinary *and* flatly indefensible: that the construction proposed by Petitioners is *itself* completely *unknown* to the ordinary usage of such terms. As will be seen, this is not merely *distorting* the ordinary meaning given to such language, but *abolishing* it by judicial decree (and ignoring binding precedent in the process).

The primary rule of construction used in Kentucky respecting statutes is virtually identical to that used respecting insurance policies. That is, such enactments are also to be accorded an "ordinary" meaning. However, whereas certain policy provisions (exclusions) are to be construed narrowly, *all* Kentucky statutes are to be *liberally* construed so as to effectuate their purpose. KRS 446.080(1),(4); *Peter Garrett Gunsmith, Inc. vs. City of Dayton*, 98 SW 3rd 517, 520 (Ky.App., 2002). Not infrequently, Kentucky's Courts have been required to apply that rule of construction to the state's workers compensation statutes (*and,* simultaneously, determining the meaning to be accorded identical language appearing in *insurance policies* applicable to that risk). In doing so (and pertinent *here*), those Courts have specifically and consistently held that in ordinary usage, merely traveling to or from the identifiable boundaries of one's workplace *is* to

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provision *has* been drawn so as to require a *consistent* application, any mistakenly manufactured inconsistency must still be resolved so as to restore that required consistency *and* in the manner most favorable to the insured.

be distinguished from being "in the course of" (or, if one will, "*participating in*") that employment. *Harlan Colleries vs. Shell*, 239 SW2nd 923, 925-27 (Ky., 1951). This distinction disappears, of course, in those instances (such as those involving traveling salesman), where duties and service to the employer (and not merely use of a "company car") extend this beyond such boundaries (and, essentially, so extend those boundaries themselves). *Taylor vs. Tyler Tire Co.*, 285 SW2nd 173, 174 (Ky., 1955). On the other hand, however, while a night watchman may well conclude his shift by conducting a tour of his or her employer's premises, either on foot *or* by vehicle, and then, without interruption, proceed directly home by way of the *same* means, the former activity simply does *not* transform the latter into further "participation in" his or her occupation. *Id.*

As may be readily seen, these decisions represent the application of an accepted rule of construction; precisely for the purpose of determining the ordinary meaning of words *synonymous* with those at issue here; in a context where those words are to be given a "liberal" reading; and, indeed, as to be expressed in *insuring clauses*, articulating the scope of coverage. Even more specifically, those decisions acknowledge and endorse the very proposition that Petitioners have asserted: that in ordinary usage, one's participation in a given event or activity *is* routinely regarded as *ended*, at least at the point when he or she has clearly exited the identifiable boundaries reserved for that purpose, and is merely traveling elsewhere with no intention to return. As may also be recognized, *this* proposed (but rejected) construction is also consonant with the ordinary meaning to be accorded the additional language appearing in the *Krieger* exclusion, *and* amenable to a consistent application of Western's exclusion to the entire range of events addressed in its text. That is, whether one has participated in a musical concert, tennis

match, poker tournament, race or parade (and whether the identifiable boundaries of that event consist of a stage, tennis court, casino or a permitted and restricted route with both a beginning and end), there is no absurdity in merely saying that such participation had *ended* at *least* at the point where (or when) he (or she) had clearly exited those boundaries; was merely traveling elsewhere; and with no intention to return. Not only have we said this, but so have the Kentucky Courts.

As earlier noted, we have found no prior instance in which *any* Court has adopted a construction even resembling the one adopted hereinbelow. That is not to say, however, that we've been unable to find instances where insurers have *attempted* to so persuade. Apparently, there have been six such efforts, all rejected, and the most recent occurring approximately 25 years ago. These efforts are represented in *Glen Falls vs. Simpson*, 439 SW 2nd292 (Ark., 1969); *Town of Surfside vs. Morrison*, 394 SW2nd 530 (Fla., 1981); and four others (from a variety of other jurisdictions), cited in the latter. In *Morrison*, a softball player had exited the field of play, following the final "out", and became injured as he attempted to retrieve a ball from nearby body of water. In *Simpson*, a foursome was enjoying a round of golf; encountered inclement weather; and while three sought the comforts of the clubhouse, the fourth took shelter under a tree located on the course, only to be injured by lightning. *Morrison*, at 530-31; *Simpson*, at 292. In both instances, the insurer attempted to invoke its "participant" exclusion. Unsurprisingly, both the Florida and Arkansas courts deemed the exclusion to be inapplicable. *Morrison*, at 530-31; *Simpson*, at 294. Plainly, just as the ruling in Simpson was rendered *despite* any similarity between the "risk" of such injury while either standing on the fairway *or* when crouched beneath a tree, that *same* ruling would have certainly been made had the injury been sustained by one of those fleeing the

course for the clubhouse, *and whether that flight was being accomplished on foot or by golf cart*. Again, the other four cases, cited in *Morrison*, follow the same pattern. In short, there has never been an instance (until *now*) where an insurer has prevailed upon the facially mistaken proposition (or its equivalent), adopted below.

The list of infirmities afflicting the rulings below extend further. As noted earlier, it is possible for one to read those rulings as selected for either *consistent* application *or*, instead, for only isolated use and in reference to a only a portion of the circumstances to which Western's exclusion is addressed. That is, the various justifications offered by the lower Courts either represent a criteria *requisite to its application*, or they do *not*, and instead represent only incidental explanation. The problem is that the construction selected below remains fatally flawed in either instance. That is, *this* construction not only conflicts with the narrower reading noted above (and entirely capable of appropriate, consistent application), but also either serves to impose criteria appearing *nowhere* in Western's exclusion (*and* being facially *incapable* of consistent application) *or* as one to be applied consistently, but *necessarily* producing the absurd.

As should be apparent, insofar as the lower Courts *have* selected a construction that is only to be applied in isolated instances, an examination of the various justifications offered in support (and juxtaposed against what is rendered ironic, companion declarations of "unambiguity") is largely unnecessary. As already established, both the text of Western's exclusion and precedent forbids such a vivisection and essentially consisting of adopting dual and inconsistent definitions of participation, each to be applied selectively to particular events and/or participants therein. More to the point, it's quite clear that Western's exclusion was drawn to provide it with a consistent level of protection and respecting

any injury sustained while practicing for or participating in any event to which that exclusion is otherwise addressed. Just as it contains nothing that would *reduce* that protection in certain instances, nor is it to be embellished as to others.

Likewise, it's application is *not* hinged on whether the agency of injury is peculiar to or inherent in the given event; it is only necessary that the injury be sustained while practicing for or participating in that event. *Friar vs. Statutory Trustees of Kirkwood Sports Ass'n.*, 959 SW2nd 808, 810-11 (Mo. App. E.D., 1997).; *US Fire Ins. Co. vs. Ohio High School Athletic Ass'n.*, 595 NE2nd 418, 17 Ohio App3rd, 760, 764 (Ohio App., 1991). Thus, just as the exclusion may not be *avoided* on such a basis, neither may it be expanded to apply to injuries sustained while merely traveling to or from such an event, and on the artificial basis consisting of a purported similarity of risk. Similarly, just as this exclusion makes no distinction between either particular events *or* hinges its application on whether the participation therein even *involves* the use of a motor vehicle (much less *particular* vehicles), neither is the presence (or absence) of vehicular "safety devices" a criterion by which its application may be either obtained *or* avoided. By the same token, just as this exclusion has no application to injuries sustained while traveling to or from an event, it may not be extended to those sustained during a certain *portion* of such travel and by way of some sort of "100 yard rule" appearing nowhere in its text. Again, however appealing these considerations were to one or both of the Courts below, they remain conditions being placed on the coverage provided by Western's policy; appearing nowhere in its text; and their use is even *more* improper when

shoehorned into that text as a basis for denial of coverage on a *selective* basis.[10]

While this addresses only a sampling of the justifications offered below, the point here is more basic. Insofar as the construction selected below *is* one to be utilized only selectively (and *regardless* of the particular criteria chosen for that purpose), it remains erroneous *as a matter of law* . Simply stated, Western's exclusion contains *nothing* to support such a duality, and may not be superimposed onto its text and under the guise of "interpretation". Here, any effort below to transform Western's exclusion into one accommodating multiple and conflicting definitions of "participation", and to be created and imposed according to

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[10] While it should be unnecessary to say so, the Sixth Circuit's pronouncement, that merely occupying a vehicle designated as a "float" necessarily places one in a parade (*Apx. p. 15a*), is obviously an even more strained equivalent of the failed argument presented in *Simpson*, i.e., that being on a *golf course* necessarily means that you must be playing golf. That proposition, when advanced here, ignores both the unrebutted testimony of the two coaches *and* that which is obvious: that victim, vehicle and the other occupants not only left the parade boundaries behind, but also the judges, audience and the cheers, etc. used to impress and entertain both. Very simply, there was no purpose to the occupancy of that vehicle beyond that point, *except* for ordinary "transportation needs". Again, and in the face of established precedent to the contrary, the lower Courts simply took the liberty of decreeing that it is *inappropriate* to distinguish between use of such a vehicle *during an event*, and as a means of merely *traveling* elsewhere, afterward. This substitution of a self-created "continuation rule" is flatly in error; a transparent recharacterization of such travel; and one which functions purely as a rewriting of Western's exclusion into one containing the additional language present in the *Krieger* exclusion, but absent here.

judicial inclination, is facially in error, whether based on the criteria just mentioned, or others articulated below.[11]

This leaves, of course, an alternative view of the rulings below: that rather than being bound to an improvidently expressed list of justifications (and since *misconstrued* as a criteria limiting the application of that construction to only select instances) the chosen construction was selected for *uniform* application. This interpretation of those rulings, however, leads one only on a collision course with the

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[11] Thus, while it is also unnecessary to say so, this Court may also appreciate our dismay as the Sixth Circuit endeavored (*Apx. p. 15a-16a*) to recast the occupants that day into the role of virtual *prisoners* on board, and based on the purported absence of a prior "opportunity" to debark. It may be observed that such a purported "loss of liberty" is merely one of several attending participation in these and other events, and (to name a few) usually including a prohibition against spreading a picnic lunch; performing bathroom functions; and either parking or sitting down in the path of others *or* performing a U-turn. None of this, however, has *ever* been viewed as transforming a subsequent trip to a restaurant, restroom or anywhere *else* into continuing "participation in" an event already *left behind*.

More fundamentally, however, the simple fact is that whether one is speaking of vehicle passengers or *houseguests*, consent is both implied and assumed (absent, of course, clear indications to the contrary) from their mere, continuing presence. Here, the efforts by the Sixth Circuit to suggest otherwise is particularly distressing when extended to a 15-year-old boy, now deceased, who was accompanied that day by his *mother*, and particularly in light of the subsequent testimony secured. In summary, a grief stricken Janet Clem (also now deceased) endured the questioning of four lawyers; by way of an examination that filled 156 pages of transcript; and detailed both the horrific events of that day and the magnitude of her loss. As pertinent here, it is sufficient to merely state that Ms. Clem **never uttered a single word concerning such involuntary occupancy**. Nor has anyone else. Nothing more need be said.

absurd, *and* transplanting similar distortion to the additional language appearing in the *Kreiger* exclusion. That is, it should be apparent (by definition) that any *consistent* application of that construction requires its application to every event and those participating, whether by way of other vehicles or on foot. Accordingly, *this* construction would necessarily ordain that one who has similarly exited a *wheelchair* race at the Special Olympics is still participating as he merely proceeds elsewhere. Conversely, an injury sustained in those circumstances would be deemed *outside* the scope of the additional language present in *Kreiger*. The same would be true of a child exiting the "finish line" of a bicycle rice and peddling directly toward his home; a nearby refreshment stand; or any other point in between or beyond. While the problem with such a uniform application is obvious, it becomes more so when it is recognized that the very *legitimacy* of such a construction hinges on the proposition that the underlying definition of "participation" being used in these instances is purportedly the "only" or "narrowest" definition recognized in ordinary parlance. Apart from being in direct conflict with the decisions cited herein, *this* proposition *also* effectively requires one to accept the ludicrous proposition that under "ordinary" usage, an attorney or judge who has previously participated in an oral argument is *still* doing so *after* exiting the doors to a now empty courtroom, and while on their way to the elevator.

The simple fact is that the construction endorsed by the Courts below *can't* be given the consistent application demanded by the terms of Western's exclusion (or, at least, without producing the absurd).[12] We thus stand by what we

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[12] This should come as no surprise. As noted, the construction selected below was that which Western strenuously advocated. During oral argument before the Sixth Circuit, however, Western was quite clear in acknowledging that which had been implicit in its arguments all along: that

have said. Both of the lower Courts were given a choice between either adopting a construction that fully comports with established precedent and the language of Western's exclusion, or one that cannot be reconciled with either.[13] As to *why* those Courts would embrace the latter, we can only offer a guess, but one that is far from unfounded. That is, one need only look to that which is explicitly expressed by both Courts as a shared, beginning perspective: that insofar as Western had endeavored, by way of its exclusion, to insulate itself from those risks attendant to event participation, this ordained that such protection should extend *so long as* risks,

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just as it's denial of coverage hinged on treating the occupants of this tractor-trailer *differently* than, say, those occupying an automobile, it required that "participation", for purposes of *this* case, be defined in a way that would be patently *inappropriate* if applied to any number of other circumstances to which its exclusion is generally addressed. *Audiotape of Oral Argument, Appeal No. 05-6160, May 31, 2006*; *Argument by Respondent* (*Questioning by Judge Gibbons*). While *this* belated admission *should have* cemented a reversal, the Sixth Circuit instead *adopted* this mistaken construction as entirely appropriate.

[13] Again, the Courts below dismissed the ordinary usage recognized by the Kentucky Courts, and in favor of a "continuation rule" of their own creation. While Kentucky's rejection of this mistaken proposition is clear from the authorities already cited, we'd note that this is even more graphically illustrated in *Marshall vs. Peerless Ins. Co.*, 428 SW2nd 190 (Ky., 1968). There, the surrender of an aircraft's controls by a flight student to a licensed pilot, *after* the landing "approach" had already begun (and mere moments before "touchdown" and the ensuing accident occurred), served to negate the application of a policy exclusion respecting any loss occurring "while" the aircraft was being "operated by a student pilot". *Marshall*, at page 191-92. Simply stated, "close" may be significant in "horseshoes and hand grenades", but is patently antithetical to Kentucky's rules of construction, requiring policy exclusions to be construed narrowly. See also, *Grimes vs. Nationwide Mut. Ins. Co.*, 705 SW as 2nd 926, 930 (Ky., 1986).

considered to be *comparable or identical*, persists. *Apx. p. 14a-15a, 36a. This* approach (again,, by definition) is one sculpted to maximize the reach of Western's *exclusion*, rather than its *coverage* obligations. That, quite clearly, is directly at odds with the approach specifically mandated by the Kentucky Courts.

What then followed, however, extends far beyond the marginal results of a mere philosophical dispute (but one which, we note, that the lower Courts, *bound* to apply Kentucky law, had no authority to wage). As the only means available by which to preempt enforcement of the underlying settlement, and by way of the principles first established in *Dressed Beef* and further refined by the Kentucky Courts in *Medical Protective* and *Vance,* the Courts below adopted a construction that is not only unprecedented, but which cannot be reconciled with either a small mountain of authority *or* the very language of Western's exclusion. As noted, the limitations of that exclusion only served to reconfirm that which was also directly at odds with the mistaken, opening perspective brought to bear by those Courts: a promise to provide unimpaired coverage to the Chamber, respecting injuries sustained while "traveling to or from" its events. The result was a major windfall to the insurer-in-breach, and loss of the same magnitude to those petitioning for this court's intervention. The error is not small, discrete or debatable. At the most fundamental level, the Courts below deprived the Petitioners of that to which they were entitled: a *process* under which they were absolutely *due* a proper application of controlling law to the facts presented. What they received was far from it.

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Again, it remains beyond our understanding that two Courts, confronted with opposing propositions, *one* of which

is fully supported by well-established precedent, and the other completely irreconcilable with that precedent and supported by *none*, would reject the former and embrace the latter. The question, at this juncture, is whether those errors are going to be corrected or allowed to stand.

In that regard, we acknowledge the burden placed on this nation's Court of last resort. However, there are other considerations worth recognizing, as well. First, to whatever extent that the task of correcting what happened here adds to this Court's burden, it rather pales in comparison to that which has been borne by these Petitioners, as the patent errors below were pyramided atop the tragic loss of a child's life and the grief absorbed by his parents. Further, it remains our view that where error with this clarity and of such magnitude occurs, it is absolutely imperative that this Court utilize its supervisory responsibilities. Carte blanche for the Circuits, and particularly respecting errors of this magnitude, simply was not contemplated as this Court's powers of review were established.[14]

When it properly performs its function, the law simultaneously presents itself as both a terrible sword to one; a protective shield to another; and without favor to either the small or the mighty. In this instance, Mr. Clem simply asked

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[14] Actually, the "burden" which we ask this Court to assume, when compared, say, to that associated with a review of a comprehensive school desegregation plan, is obviously much closer to the incidental than the onerous. Indeed, and against a backdrop composed of established principles of law and undisputed facts, little more is required than a recognition of the obvious: that as those words are commonly understood (*and* by the Kentucky Courts), this child was not, at the time of injury, "participating in" the parade he'd obviously left behind. Thus, while we'd appreciate the opportunity to appear before the Court, the truth is that if there was *ever* a case in which the issuance of a brief order of this Court and directing corrective action below, *this is that case*.

both of the Courts below to apply well-established legal principles to the undisputed facts presented. He did so in the belief that while this is certainly the *most* that a litigant may properly demand, it is also the *least* to which he is entitled. Today, those same convictions (and still widely held by others, as well) will be revealed as either misplaced, or both redeemed and reaffirmed.

CONCLUSION

We request the Court's grant of this Petition.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No: 05-6160

[Filed August 29, 2006]

The Estate of LESLIE HARRISON CLEM, JR., Deceased, By and through Administrator Leslie Clem, Sr.; The Estate of JANET HALL CLEM, Deceased, By and through Administrator Leslie Clem, Sr.; LESLIE CLEM, SR., Individually Plaintiffs-Appellants	)
v.	)
WESTERN HERITAGE INSURANCE COMPANY, a foreign insurer Defendant-Appellee	)

BEFORE: BOGGS, Chief Judge; and GIBBONS and GRIFFIN, Circuit Judges.

ORDER

Upon consideration of the petition for rehearing filed by the Appellants,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-6160

[Filed August 10, 1006]

THE ESTATE OF LESLIE HARRISON CLEM, JR., DECEASED, et al. Plaintiffs-Appellants,	)
v.	)
WESTERN HERITAGE INSURANCE COMPANY, Defendant-Appellee.	)

On Appeal from the United States District Court for the Eastern District of Kentucky

Before: BOGGS, Chief Judge; and GIBBONS and GRIFFIN, Circuit Judges.

OPINION

PER CURIAM. This is a diversity insurance coverage lawsuit under Kentucky law arising from the October 2001 death of a teenage boy from injuries that he suffered while riding on a float that had just completed a town parade route in Nicholasville, Kentucky. The decedent's family ("Estate")

filed suit in state court against a variety of defendants, including the local Chamber of Commerce ("Chamber") that had organized the parade. The Chamber's insurance company, Defendant-Appellee Western Heritage Insurance Co. ("Western"), refused to cover the loss because, it claimed, the loss fell within one of the policy's exclusion clauses. The Chamber thereafter reached a settlement with the Estate in which it (theoretically) agreed to pay the Estate $6 million and assigned to them its rights against Western, although in exchange the Estate agreed not to collect the $6 million from the Chamber itself; in consequence, the state court dismissed the suit against the Chamber with prejudice. Thereafter, the Estate filed suit against Western, and that case was removed to the United States District Court for the Eastern District of Kentucky. Both parties filed for summary judgment, which the district court granted to Western. For the reasons stated below, we affirm.

I

The Jessamine County, Kentucky, Chamber of Commerce sponsored a series of local events called the "Jessamine Jamboree" during the week of October 1-7, 2001. Among the week's events was the "Parade on Main," a procession of floats that assembled in the Winn-Dixie parking lot and then marched about 2.5 miles south along Main Street in Nicholasville, Kentucky on October 6. The local high school football team and cheerleading squad participated in the parade and arranged a "float," as they had apparently done in the past. The "float" consisted of a commercial tractor (owned and operated by Glenn Hensley) and a "lowboy" trailer (owned by CMC, Inc.). Hay bales were placed on the trailer, but a portion of the trailer's wheels remained open from above.

Several adults, including the decedent's mother Janet Clem, rode on the float as chaperones. The students were required to sign an entry form that included a "release of responsibility" clause. Leslie "Bubba" Clem, a 15-year old freshman quarterback, rode near the trailer's edge, and apparently he sat near the exposed tires. The float entered the parade staging area in the Winn-Dixie parking lot and pulled onto Main Street after the students and adult chaperones had boarded the trailer. According to one of the adult participants, Sherry Utley, the ride was very "jerky" along the whole route, and the float periodically stopped; it jerked when it started again, causing some children to fall. The float made no turns until it reached Kimberley Drive, at the southern terminus of the designated parade route, where it turned right. It traveled about 150 feet along Kimberley Drive before the truck stopped again, causing another jerk, whereupon some of the children fell again.

At that time, young Clem's foot became entangled between the rear wheel and the wheel well, and he was pulled under the trailer as the truck lurched a few feet forward. Clem was pinned beneath the wheels when the truck finally stopped. As the police statement recounted,

> the victim had his foot on the trailer tire and as the vehicle moved the trailer gave a sudden jerk causing the victims [sic] foot to fall between the trailer wheel well and the tire pulling the victim thru [sic] the tire and trailer wheel well. Witnesses stated [he] tried to pull his foot and leg free but could not.

Clem died about six hours later.

The decedent's estate filed a wrongful death suit in state court against the truck driver, the trailer's owner, the football

coach, and the Chamber of Commerce. *Inter alia,* the complaint alleged that the Chamber had duties to promulgate safety standards, to reject noncompliant floats, to monitor floats during the parade for safety, and to expel from the parade those that were operated otherwise. The Chamber of Commerce was insured under a $1 million per-occurrence General Commercial Liability policy by defendant-appellant Western Heritage Insurance Company, with an aggregate limit of $2 million. After reviewing the claim, Western notified the Chamber that Clem's injuries were excluded from the policy by the "participants' exclusion" clause, discussed in greater detail below. The Chamber later reached a settlement with the Estate on August 25, 2003, wherein it agreed to settle for $6 million for loss of parental consortium, wrongful death, and a survivor claim for damages incurred prior to Clem's death. However, the monetary settlement was entirely illusory, for the decedent's estate also agreed not to make any attempt "toward collection of the settlement amount above-mentioned from the" Chamber, and, any "failure of the [Chamber] to personally pay such amounts voluntarily shall not constitute a material breach of this agreement nor operate to invalidate its other terms." Most pertinently,

> The [Chamber] does hereby fully and completely assign, transfer and convey to [decedent's estate], any and all claims and rights of recourse which it may have against any liability carrier by which it was insured on the date of the occurrence aforementioned... [including] the [Chamber's] rights to indemnification for liability respecting the occurrence in question; its obligations under this instrument; and to reimburse for amounts incurred by the [Chamber] in defense of the pending action, and extra-contractual claims for bad faith, and for extracontractual damages. Provided, however, that

> [decedent's estate] agree to reimburse [Chamber] the actual amount of its reasonable attorney fees incurred to date, not to exceed [$12,500], from any recovery actually recovered ...

In other words, the "settlement" not only relieved the Chamber of all liability, it offered the prospect of recouping all the attorneys' fees that the Chamber had incurred, up to $12,500. The settlement was also not to be construed as an admission of liability by the Chamber, and it required the Estate to execute an order dismissing its action against the Chamber with prejudice, which was effected in state court on September 8, 2003.

In consequence, the Estate notified Western of Western's purported obligation in April 2004, claiming that Western was liable for the entire amount of the settlement between the Chamber and decedent's estate. Subsequently, the Estate filed suit in state court against Western, and this action was removed to the United States District Court for the Eastern District of Kentucky on June 18, 2004. On July 7, 2004, the decedent's estate filed a motion for partial summary judgment or judgment on the pleadings, and Western responded by filing its own motion for summary judgment on July 21.

On January 6, 2005, the district court granted Western's motion for summary judgment, holding that the liability for Clem's death was excluded from the Chamber's insurance policy with Western because (a) the policy exclusion language was not ambiguous, and (b) the float was still participating in the parade by heading toward the disembarkation zone even though it had just left the official parade route. The district court therefore did not reach the questions of an insurance company's liability under a covenant not to execute when it wrongly refused coverage and defense or of the settlement's

reasonableness. The decedent's estate thereafter filed a motion to alter, amend, or vacate judgment, and the district court denied that motion on June 7, 2005. The Estate filed a timely notice of appeal.

II

Because the district court granted summary judgment in favor of appellee, we apply a *de novo* standard of review, "drawing all reasonable inferences in favor of the non-moving party." *Johnson v. Karnes,* 398 F.3d 868, 873 (6th Cir. 2005). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R, Civ. P. 56(c). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Eke. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), it must present significant probative evidence in support of its complaint to defeat the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "The mere existence of a scintilla of evidence in support of the plaintiffs position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

The principal issue here is whether the Chamber's insurance policy obligates Western to indemnify the Chamber in this particular instance; that is to say, we must ascertain whether the participants' exclusion clause operates to exclude the decedent's injury from the Chamber's policy with

Western. Kentucky's substantive law controls this diversity case.

A

In Kentucky, insurance contract interpretation is generally a matter of law. *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503, 507 (6th Cir. 2003) (citing *Stone v. Ky. Farm Bur. Mut. Ins. Co.*, 34 S.W.3d 809, 810 (Ky. Ct. App. 2000)). The "plaintiff must show the existence and the breach of a contractually imposed duty." *Lenning v. Commerc. Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001). As we have previously noted

> Under Kentucky law, a court should determine at the outset of litigation whether an insurance company has a duty to defend its insured by comparing the allegations in the underlying complaint with the terms of the insurance policy. An insurance company has a duty to defend its insured if the language of an underlying complaint against the insured brings the action within the scope of the insurance contract.

Westfield, 336 F.3d at 507 (citing *DiBeneditto v. Medical Protective Co.*, 3 Fed. Appx. 483, 485 (6th Cir. 2001)). However, the duty to defend in Kentucky is broader than the duty to indemnify, for "insurers have an obligation to defend if there is an allegation which potentially, possibly or might come within the coverage of the policy." *Lenning*, 260 F.3d at 581 (citations and internal quotation marks omitted). As such, "even if an insurance company denies coverage based on the mistaken belief that it is justified in doing so, the company may still breach its contact with the insured." *Ibid.*

To determine whether an insurance company has violated its duty to defend under Kentucky law, courts must first determine whether the relevant policy terms are ambiguous. The Kentucky Supreme Court has held, in the context of uninsured motorist coverage,

> When faced with the necessity of construing such statutory and contractual language, we must look to prior pronouncements of any policy by which such insurance contracts will be interpreted by the courts of Kentucky. In so doing, we find that two cardinal principles apply: (1) the contract should be liberally construed and all doubts resolved in favor of the insureds; and (2) exceptions and exclusions should be strictly construed to make insurance effective.

Ky. Farm Bur. Mut. Ins. Co. v. McKinney, 831 S.W.2d 164, 166 (Ky. 1992). As such, "Kentucky should adhere to its stated policy of liberally construing insurance contracts in favor of the asserted 'insured' to provide insurance coverage and thereby make insurance effective." Id. at 167. Kentucky's Supreme Court has not limited its policy disfavoring exclusion clauses to situations where statutes regulate particular types of insurance: "Kentucky law is crystal clear that exclusions are to be narrowly interpreted and all questions resolved in favor of the insured." *Eyler v. Nationwide Mut. Fire Ins. Co.,* 824 S.W.2d 855, 859 (Ky. 1992). However, this is not to suggest that Kentucky has pronounced exclusion clauses entirely inoperative. *Ky. Farm Bur. Mut. Ins. Co. v. Thompson,* 1 S.W.3d 475,476-77, 46 13 Ky. L. Summary 19 (Ky. 1999) (recognizing that only the legislature can establish public policy, and that prior holdings abrogating certain exclusion clauses were based on legislative acts). Thus, the interpretative canon disfavoring exclusion clauses operates only where the policy language is found to be ambiguous.

"An essential tool in deciding whether an insurance policy is ambiguous, and consequently should be interpreted in favor of the insured, is the so-called 'doctrine of reasonable expectations.'" *Simon v. Cont. Ins. Co.*, 724 S.W.2d 210, 212 (Ky. 1986). That is to say, "[a]n insurance contract must be construed according to its true character and purpose, and in accordance with the intentions and expectation interests of the parties." *Nat. Ins. v. Lexington Flying Club,* 603 S.W.2d 490, 493 (Ky. Ct. App. 1980). Therefore, the language of an insurance policy "must be interpreted according to the usage of the average man and as they would be read and understood by him in the light of the prevailing rule that uncertainties and ambiguities must be resolved in favor of the insured." *Fryman v: Pilot Life Ins. Co.*, 704 S.W.2d 205, 206 (Ky. 1986).

Finally, an insurance company that mistakenly fails to defend an insured is liable for reasonable settlements under Kentucky law. *Interstate Cas. Co. v. Wallins Creek Coal Co.*, 164 Ky. 778, 176 S.W. 217, 219 (Ky. 1915). When the insured reaches such a settlement without the insurance company's defense, the insured "is entitled to recover all damages naturally flowing from the breach." *Grimes v. Nationwide Mut. Ins. Co.*, 705 S.W.2d 926, 932 (Ky. Ct. App. 1985). Such settlements by the insured "will not be rescinded for fraud unless the evidence showing fraud is clear, unequivocal and convincing." *Gumm v. Combs,* 302 S.W.2d 616, 617 (Ky. 1957).

B

As an initial matter, we must determine whether Western violated the terms of its insurance contract with the Chamber by refusing to defend. Pertinent to that inquiry, we must ascertain whether the contract's relevant policy terms are ambiguous. Kentucky's courts have taken broad views of

'ambiguity' in the past. For instance, the Kentucky Supreme Court has recently found policy exclusions relating to losses suffered "while committing or attempting to commit a crime" and "treatment for injuries sustained as a result of being under the influence of alcohol" to be ambiguous. *Healthwise of Ky., Ltd. v. Anglin,* 956 S.W.2d 213, 216, 44 13 Ky. L. Summary 15 (Ky. 1997). In that case involving injuries sustained while drag-racing under the influence of alcohol, the court held that, although "[w]e believe that the average person would view Anglin's behavior in this case as criminal," nevertheless, "we do not believe that the word 'crime' . . . should be defined as the ordinary person would use the word" because "[p]eople often use the words 'crime' and 'criminal' to describe actions which, though perhaps reprehensible, are neither illegal nor unlawful." *Ibid.* Following the state's policy of adopting the interpretation most favorable to the insured when an exclusion is ambiguous, the court found that the policy only excluded misdemeanors and felonies, whereas drag racing "is a traffic infraction. .. and is not a 'crime' as defined in [the state's] Code." *Ibid.*

Similarly, Kentucky's courts have found that an injured motorist was covered by her motor vehicle insurance despite the fact that she was injured while driving her car by a rock that was flung from a nearby lawnmower. *Ky. Farm Bur. Mut. Ins. Co. v. Hall,* 807 S.W.2d 954, 955 (Ky. App. 1991). This would seem to follow the decisions of sister states upholding insurance coverage despite the presence of athletic exclusion clauses for a golfer who was injured by lightning while hiding from the thunderstorm (and therefore not playing golf any longer) under a tree on the golf course, *The Glens Falls Group Ins. Co. v. Simpson,* 246 Ark. 654, 439 S.W.2d 292, 294 (Ark. 1969), and for a softball player who was injured while retrieving a ball that had been hit out of the park after the Softball game had apparently ended. *Town of*

Surfside, Fla. v. Morrison Assurance Co., Inc., 394 So.2d 530, 530-31 (Fla. Dist. Ct. App. 1981). But it is worth noting that Kentucky's courts have also required employees to allege some causal nexus between their duties as employees and their driving of a company-provided automobile closer than mere commuting in order to state a valid workers compensation claim. *Davis v. Southeastern Stone Quarries, Inc.*, 464 S. W.2d 258, 259 (Ky. 1971) (injured party was "coming or going" to or from work when injured, and therefore not covered by workers compensation). *See Harlan Collieries Co. v. Shell*, 239 S.W.2d 923, 925 (Ky. 1951).

Kentucky's courts have required that the nexus connecting the injury to the insurance coverage be more than merely incidental to afford coverage. For instance, the Kentucky Supreme Court has required a nexus between the operation of a vehicle and indemnity stronger than mere proximity to the covered vehicle. *State Farm Mut. Auto. Ins. Co. v. Rains*, 715 S.W.2d 232, 234 (Ky. 1986) (motorist denied recovery under statutory motorist reparations benefit plan when struck by a baseball bat while trying to enter his car during a fight with people who were already fighting on and around his vehicle; this case was consolidated with another involving the intentional shooting by a third party of the insured while he was in his car, for which the court also affirmed summary judgment). Very recently, the Kentucky Supreme Court has held that an insurance company was not required to indemnify local elected officials who were found to have violated provisions of the Kentucky constitution prohibiting elected officials from increasing their salaries during their current terms of office. But the insurance policy in that case covered only breaches of fiduciary duty and commissions of torts, and the state supreme court held that their violations involved neither type of offense. *Ky. Assoc. of Counties v. McClendon*, 157 S.W.3d 626, 628 (Ky. 2005).

Returning to the instant case, it is not disputed that the Chamber's policy had the following "participants' exclusion" clause:

> Such insurance as it provided by this policy does not apply to, and the Company shall have no duty to defend any action brought to recover damages because of: A. "Bodily injury" or "personal and advertising injury" to any person while practicing for or participating in any contest, demonstration, event, exhibition, race or show. As used in this provision any person shall include but not be limited to participants, attendants, mechanics, stewards, timing officials, announcers, corner men, musicians, singers, animal handlers, officials or any other person employed by or doing volunteer work for the named insured.

Clem was killed *after* his float had completed its tour on the parade route but *before* he had debarked the float. The float was undoubtedly headed for a locale where its passengers could disembark (for it could not stop on the official parade route to debark its passengers), and it was within about 150 feet of the parade route's official terminus when Clem was killed. Thus, the question before us is whether the word *participation* as it is used in the policy is sufficiently ambiguous to require us to define the term in a reasonable manner favoring coverage. If so, we must then determine whether the resulting construction would reasonably allow us to find that Clem's injuries were not subject to the insurance company's policy exclusion clause.

We find that the contractual phrase "practicing for or participating in" is not ambiguous. The exclusion clause's purpose is evident on its face: participation in town festivities, particularly in parades, creates a heightened risk of injury,

and the insurance company was unwilling to indemnify that risk at the premium rate that the Chamber was willing to pay. We believe it follows as a "reasonable expectation" that riding on a parade float constitutes "participation" in a parade, and that the outer limits of such "participation" are best defined in the instant case by the fact of riding on the float rather than the float's location with respect to the parade's official viewing route.

Riding on an open-top parade float is an inherently unsafe activity, for passengers are typically not provided with any of the normal safety devices that ordinary automobile passengers enjoy. As such, riding on a float constitutes a special activity specific to a parade, distinct from riding on a vehicle to meet transportation needs, and the float's riders would necessarily be aware of their participation in a parade by riding on the float. Moreover, reasonably large parades necessarily require some staging area before and after the parade's official viewing area for the floats and other parade marchers to congregate and organize. Specifically, people intending to ride on floats must get on the float at some point prior to the official "beginning" and they then must be given the opportunity to get off the float at some point after it has passed the viewing area's terminus. In the instant case, the parade's organizers had specifically ordered the floats to debark their riders somewhere other than at the official terminus so as to avoid generating a traffic jam that could bring the parade itself to a grinding halt, though the organizers did not identify a specific place where passengers could get off the floats.

The Estate strenuously argues that the decedent was no longer participating in the parade because the float had left the parade's official route by the time of the accident. We do not agree. Whether a float could travel beyond some outer

boundary so that its riders would no longer be participating in the parade by their lack of proximity to the parade route would require us to engage in needless speculation. It is unquestioned that the float in this case had just left the parade's viewing terminus, had traveled only about 150 feet further, and had not yet provided its riders with any opportunity to debark. Whatever the possible merits of this argument on other facts, no reasonable trier of fact could find that traveling 150 feet with no opportunity to debark constitutes exiting the parade's zone of participation.

In consequence, we hold that the policy exclusion clause was not ambiguous, and we further hold that the clause operated to exclude the decedent's injury from the insurance policy's coverage because his injuries were incurred at a time when he was still participating in the town parade. We therefore do not reach the questions respecting the reasonableness of the settlement or the effect in Kentucky of the Chamber's agreement with the Estate.

III

We **AFFIRM** the district court's grant of summary judgment to Western.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 04-274-KSF

[Filed June 7, 2005]

ESTATE OF LESLIE HARRISON CLEM, JR., deceased, by and through Administrator Leslie Clem, Sr., et al.	)
PLAINTIFFS	)
V.	)
WESTERN HERITAGE INSURANCE CO.	)
DEFENDANTS	)

OPINION & ORDER
(FILED UNDER SEAL)

This matter is before the Court on the plaintiffs' motion to alter, amend, or vacate [DE #20] the Court's Opinion and Order entered January 6, 2005, and plaintiffs' motion for a hearing on same [DE #25].

In the opinion and order entered herein, the Court ruled that the "Participants Exclusion" of the applicable commercial general liability coverage insurance policy applied to the

circumstances of this case. As a result, the policy did not provide coverage for the injuries Leslie Harrison Clem, Jr., sustained or his resulting death. In their present motion, the plaintiffs argue that the Court failed to apply the principle of differential interpretation to the terms of the CGL Policy. Put another way, the Court did not give sufficient effect to Kentucky law that requires the same word to be interpreted differently depending on whether it occurs in an insuring clause, where it is to be broadly interpreted, or an exclusion, where it is to be given its strictest and most narrow meaning. The plaintiffs argue that this is particularly true where the interpretation involves temporal criteria (e.g., "during" or "while").

The plaintiffs further argue that the Court's construction of the term "participation" in the Participants Exclusion was incorrect in that it was the broadest interpretation imaginable, instead of the narrowest as required by Kentucky law. The Participants Exclusion only applies to persons injured "while practicing for or participating in any contest, demonstration, event, exhibition, race or show." Just as this exclusion would not cover injuries of those who were "coming and going" to a contest, demonstration, event, exhibition, race, or show, it did not cover Clem's injuries in the present case, which occurred after the official parade route had ended and the float was returning to the staging area. In other words, travel to and from the site of a contest, demonstration, event, exhibition, race, or show does not extend the site itself or one's participation therein. Thus, regardless of how Clem's travel to and from the recognized parade route was accomplished, and despite its similarity to the event itself, the Participants Exclusion has no application beyond the recognized parade route under Kentucky law because Clem was not "participating" in the parade but "departing" from it.

The defendant, in response, argues that nowhere in the plaintiffs' motion do they identify an error of law, but merely disagree with the Court's application of the law to the facts of this case. Thus, they have not met their burden under Rule 59. On the merits, the defendant points to the inconsistency in the plaintiffs' position. If Clem was still participating in the parade when he was injured, the Participants Exclusion would negate coverage. On the other hand, if he was not participating in the parade when he was injured, then the CGL Policy does not provide coverage in the first instance, because he must be considered to have been injured in an unrelated and remote motor vehicle accident. The examples provided by the plaintiffs highlight this inconsistency - if someone were injured "coming or going" to an event, there would be no coverage *not* based on the Participants Exclusion, but because the policy simply would not provide coverage for this separate and unrelated occurrence.

In reply, the plaintiffs assert that the defendant's argument rests on the mistaken notion that insurance coverage obligations somehow depend on an insured's culpability in tort. In this case, the plaintiffs allege that the Chamber's failure to impose appropriate safeguards with respect to the parade caused Clem's injuries and death. Under this scenario, there is nothing in the CGL Policy's insuring clause that negates coverage in these circumstances and there no conflict between the proposition that the Chamber's failure to adopt safeguards exposed it to liability respecting Clem's death and that the Participants Exclusion (particularly under a mandated, narrow construction) became inapplicable as Clem and the float exited the designated parade route and thus ceased to participate therein. The plaintiffs assert that the defendant's attempt to confuse coverage with culpability results in a comparison of apples to oranges.

Having reviewed the pleadings on the present motion, the Court finds that oral argument on the motion is not necessary and, therefore, will deny the plaintiffs' motion for a hearing. In considering a motion pursuant to Rule 59, one court has made the following observations:

> Motions for reconsideration are extraordinary in nature and so should only be granted sparingly. *Plaskon Electronic Materials v. Allied-Signal*, 904 F. Supp. 644, 669 (N.D. Ohio 1995) (citing *In Re August, 1993 Regular Grand Jury*, 854 F. Supp. 1403, 1406 (S.D. Ind.1994) *and Bakari v. Beyer*, 870 F. Supp. 85, 88 (D.N.J. 1994)). There are three basic situations in which a court will reconsider its order: 1) there has been an intervening change in the controlling law, 2) there is new evidence which has become available, and 3) there is a need to correct clear legal error or to prevent manifest injustice, *Id.* (citing *Bermingham v. Sony Corp. of Ameriea, Inc.*, 820 F. Supp. 834, 856 (D.N.J. 1992)). The court, in order to promote finality of decisions and judgments, should not consider such a motion when the moving party merely disagrees with the court's decision and attempts to reorganize and refocus its previous evidence and legal analysis, *Id.*

Gesler v. Ford Motor Co., 185 F. Supp.2d 724, 729 (W.D. Ky. 2001). The present motion argues that the Court committed clear legal error. After reviewing the record, including the parties' pleadings on the summary judgment motions, the Court disagrees.

The plaintiffs provide a number of examples they argue highlight the Court's erroneous interpretation of the Participants Exclusion. These include a yodeler who continues

to yodel after a show, two boxers who drive from Ashland and Louisville to fight a match in Nicholasville, owners of antique automobiles driving to an exhibition in another town, and a child entering a bicycle race. The Court finds that these examples do not apply because the Court must consider the facts and circumstances *in this case*, and they do not assist the Court in its determination of when Clem's participation in the parade ended in the present case. Further, regardless of how the Court might apply the Participants Exclusion to these examples provided by the plaintiffs, the Court cannot stretch the language of the Participants Exclusion, through strained construction, simply to find against the insurer. As noted by the Kentucky Supreme Court,

> [t]he rule of strict construction against an insurance company certainly does not mean that every doubt must be resolved against it and does not interfere with the rule that ***the policy must receive a reasonable interpretation*** consistent with the parties' object and intent or narrowly expressed in the plain meaning and/or language of the contract. Neither should a nonexistent ambiguity be utilized to resolve a policy against the company. We consider that courts should not rewrite an insurance contract to enlarge the risk to the insurer.

St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc., 870 S.W.2d 223, 226-27 (Ky. 1994) (emphasis supplied) (citing *U.S. Fidelity & Guar. Co. v. Star Fire Coals, Inc.*, 856 F.2d 31 (6th Cir. 1988)).

There is no question that the circumstances of this case are tragic and heartbreaking. However, this cannot be the basis for the Court to construe and apply the policy in a manner it finds inconsistent with the language of the CGL Policy and

the facts of this case simply to provide coverage. Accordingly, the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS that

(1) the plaintiffs' motion to alter, amend, or vacate [DE #20] is DENIED; and

(2) the plaintiffs' motion for a hearing on same [DE #25] is DENIED.

This 7th day of June, 2005.

/s/
KARL S. FORESTER, SENIOR JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 04-274-KSF

[Filed January 6, 2005]

ESTATE OF LESLIE HARRISON CLEM, JR., deceased, by and through Administrator Leslie Clem, Sr., *et al.* PLAINTIFFS	)
V.	)
WESTERN HERITAGE INSURANCE CO. DEFENDANT	)

OPINION & ORDER
(FILED UNDER SEAL)

This matter is before the Court on the plaintiffs' motion for partial judgment on the pleadings or for partial summary judgment [DE #5]; the defendant's motion for summary judgment [DE #6]; and the plaintiffs' motion for leave to file supplement to the defendant's reply [DE #14]:

I. FACTUAL BACKGROUND & PROCEDURAL HISTORY

This is an action for declaratory judgment on the question of insurance coverage brought by the representatives of the estate of Leslie Harrison Clem, Jr. ("Estate" or "Clem"), and by Leslie Harrison Clem, Sr., against Western Heritage Insurance Company ("Western"). The action was originally brought in state court, and was removed to this Court by the defendant on the basis of diversity jurisdiction.

The material facts of this tragic case are uncontested. In October of 2001, the Jessamine County Chamber of Commerce ("JCCC" or "Chamber") organized the "Jessamine Jamboree" (the "Festival") in Jessamine County, Kentucky. This Festival and all of its attendant activities, including the "Parade on Main," were planned, organized, and sponsored by the Chamber. The Chamber published a designated parade route beginning at a point on North Main Street near a McDonald's restaurant and ending at a point on South Main Street near a Kroger grocery store. However, participants in the parade apparently boarded the various floats in the parade in the parking lot of a Winn Dixie supermarket before entering the officially-designated route.

On October 6, 2001, Clem, a 15-year old member of the West Jessamine High School football team, was riding on a tractor-trailer with a "lowboy" trailer which, according to the plaintiffs, had been approved by the Chamber as a float in the parade (the "Float"). According to the plaintiffs, all members of the football team were required to attend the parade and ride on the Float. The ride through the "official" parade route was without incident. Tragically, however, after the Float had apparently exited the officially-designated parade route, an

accident occurred on Kimberly Drive and Clem sustained massive, and ultimately, fatal injuries.

Western had issued a commercial general liability coverage insurance policy ("CGL Policy") to the Chamber effective September 1, 2001. As a result of contact by the plaintiffs following Clem's death, the Chamber notified Western of the incident. Western denied coverage in a letter to the Chamber in January of 2002. In September of 2002, the plaintiffs sued the Chamber and others[1] in Jessamine County, Kentucky, Circuit Court claiming wrongful death and negligence (the "Underlying State Action"). As to the Chamber, the plaintiffs' complaint alleged that it had been negligent in planning the Festival while failing to adopt appropriate safety standards. In a letter to the Chamber dated October 18, 2002, Western again denied coverage for the incident and declined to provide a defense for the Chamber in the Underlying State Action.

On August 25, 2003, the plaintiffs and the Chamber settled all claims in the Underlying State Action.[2] Under the terms of the confidential settlement agreement, the Chamber agreed that "in lieu of an Agreed Judgment and companion assignment to the same effect," the Chamber would pay the plaintiffs $6 million for the outstanding state tort claims. However, the settlement agreement also stated that

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[1] Other defendants included the owner/operator of the tractor, the owner of the lowboy trailer, and the West Jessamine High School football coach. Western was not a named defendant in the underlying state court action and none of the state court defendants are named in the present action.

[2] The settlement was thereafter authorized by the Chamber's Board of Directors by resolution dated September 8, 2003.

"[n]otwithstanding the foregoing, no attempt shall be undertaken by the [plaintiffs] toward collection of the settlement amount above-mentioned from [the Chamber], except as outlined below in paragraph 'B'. . . ." In Paragraph B, the Chamber assigned to the plaintiffs "any and all claims and rights of recourse which it may have against any liability carrier by which it was insured on the date of the occurrence aforementioned . . . without limitation of any kind." This expressly included any bad faith claim the Chamber may have against any of its carriers. The parties further agreed that they would execute "an Agreed Order, dismissing all claims . . . with prejudice." No judgment was entered in the State Court Action; instead, on September 16, 2003, the Court entered an order entitled "Agreed Order Dismissing as Settled with Prejudice" which was also executed (and presumably tendered) by counsel for the parties.

It appears, then, from the Settlement Agreement that the plaintiffs dismissed their claims against the Chamber and in return, received not money or the promise of money, but an assignment of the Chamber's rights and claims against Western. From the Court's reading of the Settlement Agreement, the plaintiffs cannot ever pursue the Chamber for the $6 million settlement amount, but simply received the *opportunity* to obtain the money from Western.[3] A similar

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[3] This is confirmed by statements made by plaintiffs' counsel in settlement negotiations:

> [W]e suggest that the Chamber recognize (as we have) the core effect of the proposed agreement: that it's [sic] benefits to the Chamber are complete and guaranteed, while any benefit that might inure to our clients will remain contingent on its success in shouldering the burden of contesting the denials of coverage previously received by

type of agreement - consisting of a consent or agreed judgment coupled with a covenant not to execute - is often referred to as an "assignment of rights with a covenant not to execute," a "Damron agreement," or a "Damron/Morris agreement."

Thereafter, on May 18, 2004, the plaintiffs sued Western in Jessamine Circuit Court in an attempt to enforce the terms of the Settlement Agreement as against Western. In their complaint, the plaintiffs (1) sought a declaration that the Western CGL Policy was applicable to the plaintiffs' claims in the Underlying State Action (Count I); (2) claimed that Western's refusal to defend and indemnify was a breach of the insurance contract (Count II); and (3) claimed bad faith (Count III). As for damages, the plaintiffs stated they are entitled to recover the entire amount in the Settlement Agreement (which is well above policy limits), as well as attorneys' fees and punitive damages. Western timely removed the action to this Court.

The plaintiff has moved for partial summary judgment on Counts I and II of the complaint. Western has moved for entry of summary judgment in its favor on all counts.

II. STANDARD ON SUMMARY JUDGMENT

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions,

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> the Chamber. In short, our clients will assume, unto themselves, all risk of loss previously borne by the Chamber.

(Exh. 13 to DE # 8; ltr. dtd. 7/1/03 from plaintiffs' counsel to counsel for JCCC.)

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In reviewing a motion for summary judgment, "this Court must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343,346 (6th Cir. 1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus.Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Once the moving party shows that there is an absence of evidence to support the nonmoving party's case, the nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Phillip Morris Companies, Inc.*, 8 F.3d 335,340 (6th Cir. 1993). Conclusory allegations are not enough to allow a nonmoving party to withstand a motion for summary judgment. *Id.* at 343. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted).

III. COVERAGE UNDER THE CGL POLICY

This case potentially raises an interesting question of Kentucky state law involving the conditions under which a settlement consisting of a dismissal with prejudice (as opposed to a consent or agreed judgment) coupled with a covenant not to execute may be enforced against an insurer who has wrongly refused coverage and refused to defend. However, this question only arises if the Court first determines that Western *wrongly* refused to defend; i.e., that Western's CGL Policy did, in fact, provide the Chamber with coverage in connection with Clem's death under the circumstances of this case.

A. CGL Policy and Western's Denials of Coverage

The CGL Policy at issue had a per occurrence limit of $1,000,000 and a general aggregate limit of $2,000,000. Included in the premium were the following classifications: (1) "Clubs - Buildings Owned or Leased;" and (2) "Exhibitions - Outside." (DE #8; Exh. 3.) The bulk of the premium paid on the policy was for the "Exhibitions" portion of the policy.

As noted above, Western denied both liability coverage and a defense to the Chamber in relation to Clem's death. By letter dated January 16, 2002, Western initially denied coverage for the incident based on the "Participants Exclusion" found at form WHI 21-0159 (4/00). Western further stated that "Les Clem Jr. was participating in the Jessmine [sic] Jamboree Parade held by Jessamine County Chamber of Commerce when he was fatally injured. Therefore, Western Heritage Insurance Company respectfully disclaims coverage for this incident." (DE #8, Exh. 1, 1/16/02 ltr. at p. 3.) By facsimile dated October 18, 2002,

Western again denied coverage and further refused to participate in the defense of the Underlying State Action when notified of the filing of the suit. (*Id.*; 10/18/02 ltr. at p.1.)

On May 18, 2004, the same day this action was originally filed in State court, Western, by counsel, again set forth the reasons for its denial of coverage by letter to Clem's counsel. Therein, Western denied coverage and defense based on the Participants Exclusion, stating that "the facts establish that the plaintiff was participating in an event or show sponsored by the JCCC." (*Id.*, 5/18/04 ltr. at p. 6.)[4]

B. Participants Exclusion

1. The Parties' Arguments

Primarily at issue is the application of the Participants Exclusion in the CGL Policy, which states in relevant part as follows:

> Such insurance as is provided by this policy does not apply to, and the Company shall have no duty to defend any action brought to recover damages because of:

---

[4] Western also referred to the "designated premises endorsement," which it argued limited coverage to "claims that arise out of the ownership, maintenance or use of the designated premises shown in the schedule, or operations necessary or incidental to those premises." (*Id.* at p. 7.) Because the parade did not take place at the designated premises, Western reserved the right to deny coverage on this basis, as well.

> A. "Bodily injury". . . to any person while practicing for or participating in any contest, demonstration, event, exhibition, race or show.
>
> As used in this provision any person shall include but not be limited to participants, attendants, mechanics, stewards, timing officials, announcers, corner men, musicians, singers, animal handlers, officials or any other person employed by or doing volunteer work for the named insured.

(DE #6, Exh. A, Form WHI 21-0159 (03/99).)[5] The plaintiffs assert that this exclusion does not apply, based on the following. The parade route as designated and published by the Chamber officially ended at the Kroger grocery store on South Main Street. The Float on which Clem was riding passed this termination point, continued traveling south on South Main Street, then turned west onto Kimberly Drive. The incident that killed Clem occurred after the Float had traveled "an extended distance" on Kimberly Drive, later described by the plaintiffs as "more than half a football field away from Main Street (and the parade route)." According to the plaintiffs, the Participants Exclusion only applies to persons who are injured "while" participating in an event such as a parade. In the present case, Clem was not injured *while* participating in the parade, but only *after* the Float had exited the officially-designated parade route, was approximately 175 feet away, and on a completely different street. Because the event (the parade) was over when Clem

---

[5] Although the form attached as an exhibit to Western's motion for summary judgment is technically not the same form as that referred to in its letter of January 16, 2002, the language is the same.

was injured, the Participants Exclusion has no application in the present case, the plaintiffs argue.

Western responds that the plaintiffs cannot have it both ways. On the one hand, the plaintiffs argue that Clem was not a "participant" in the parade because he had exited the designated parade route. On the other hand, they argue that JCCC is responsible for Clem's injuries because it sponsored the parade, even though Clem was no longer participating in it when he was injured. Western argues that the CGL Policy did not provide coverage for the incident under either scenario.

According to Western, if the Court were to find that Clem's "participation" in the parade continued beyond the termination point of the designated parade route, such as to a staging area or other disembarking area where the students would then get off the Float, then the Participants Exclusion applies and there is no coverage. However, if the Court were to find - as the plaintiffs urge - that Clem's participation in the parade absolutely ended once the Float turned off of Main Street, the Participants Exclusion would arguably not apply, but the CGL Policy simply would not cover the incident because there is no condition or term of the policy that *creates* coverage for an accident in this situation.

In response to these arguments, the plaintiffs argue that Western does nothing to explain how Clem remained a participant in an event that had ended and in which he was no longer taking part. Both the Float and Clem had completed the officially-designated parade route, exited it, and were on a different street when Clem was injured. Thus, they were no longer "participating" in the Chamber-sponsored event and, thus, the Participants Exclusion does not apply.

In further support of its argument that Clem was still a participant in the parade, even though the Float had traveled beyond the designated parade route, Western asserts that one of the plaintiffs, Clem's mother, testified that she understood they were not permitted to stop or break down their floats at the end of the designated route because it would back up the rest of the parade. (Because she was a cheerleading sponsor, Mrs. Clem was also riding on the Float during the parade and when the incident occurred.) Mrs. Clem also testified that it was understood that everyone would remain on the Float until it reached the original staging area (the Winn Dixie parking lot), where students' parents were waiting to pick them up.

In a tendered sur-reply, the plaintiffs reiterate that the Participants Exclusion only applies to those injured "while" participating in an event, and has no application where the injuries are sustained *after* the victim and vehicle have completed and exited the parade route designated by the sponsor. As to Mrs. Clem's testimony, the plaintiffs point out that she also testified that passengers had historically disembarked on Kimberly Drive and that it was not clear where the destaging area would be during the parade in question - Kimberly Drive or the Winn Dixie parking lot.

2. Analysis

According to Kentucky law, which the Court must apply in this case, the terms of an insurance contract control, unless contravened by a statute or public policy. *Meyers v. Kentucky Medical Ins. Co.*, 982 S.W.2d 203, 210 (Ky. Ct. App. 1997). The general rules of construction have been set forth by one court as follows:

> An insurance policy is to be liberally construed in favor of the insured, if the language is ambiguous, and

> the policy is susceptible to more than one reasonable interpretation. Exclusions are strictly construed, and an exclusion must be clearly stated in order to apprise the insured of the limitation. However, these rules do not contravene the fact that the policy must receive a reasonable interpretation consistent with the parties' intent. Neither should a nonexistent ambiguity be utilized to resolve a policy against the company. Courts should not rewrite an insurance contract to enlarge the risk to the insurer.

Ayers v. C & D General Contractors, 237 F. Supp.2d 764, 768 n.5 (W.D. Ky. 2002) (citations omitted). "An ambiguity may either appear on the face of the policy or . . . when a provision is applied to a particular claim." *St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc.*, 870 S.W.2d 223, 227 (Ky. 1994).

> The insuring clause in the CGL Policy regarding claims for "bodily injury" is broad:
>
> We will pay those sums that the insured become legally obligated to pay as damages because of "bodily injury". . . to which this insurance applies . . . . However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury". . . to which this insurance does not apply.

(DE #6, Exh. A, at CG 00 01 07 98, ¶ 1.a.) In the present case, the parties do not dispute that Clem sustained his injuries after the Float had traveled beyond the termination point of the official parade route as designated by the Chamber. The dispute involves the application of the Participants Exclusion under these circumstances - was Clem

injured "while . . .participating in any contest, demonstration, event, exhibition, race or show"?

The Court finds that the Participants Exclusion applies for a couple of reasons. As an initial matter, the Court does not find the Participants Exclusion to be ambiguous, either on its face, or in its application to the plaintiffs' particular claim. In the present case, the plaintiffs focus on where the *official parade route* ended, instead of when Clem's *participation* in the event ended. Clem's participation in the Parade did not end simply because the Float had reached the officially-designated termination point of the parade. Rather, the evidence suggests that the floats in the parade continued on with the voluntary participants, still riding the floats *beyond* this official termination point. Common sense dictates that persons riding on a parade float continue to "participate in" that event until the float stops and they disembark. It simply does not make sense to say that Clem was no longer participating once the Float traveled beyond the parade's officially-designated termination point: the Float was still moving and the students were still riding on it.

Further, the plaintiff's interpretation requires the Court to read additional terms into the Participants Exclusion. The exclusion does not read that it applies only if a person is injured "while participating in *the officially-designated portion* of any contest, demonstration, event, exhibition, race or show." The Court considers the plaintiffs' interpretation too narrow, focusing on the arbitrary point at which the official parade route ends, as opposed to when *Clem's participation* in the parade ended.[6]

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[6] This misdirected focus is highlighted in the plaintiffs' tendered sur-reply. Therein, they state that "whether the event is a parade or

Also, the language of the Participants Exclusion excludes coverage for persons involved in "any contest, demonstration, event, exhibition, race or show" - activities that have elements of voluntary participation, direct competition, and/or show or display, and which invite spectators or fans to observe. Such activities inherently involve a higher or different risk from other activities associated with a festival such as the Jessamine Jamboree and, as this case has borne out, riding on a float in a parade is one of these higher-risk activities. As evidenced by the Participants Exclusion, it is clear that Western did not intend to insure such a higher or different risk. This higher or different risk did not simply end at the geographical point of the officially-designated parade termination point. Rather, the higher or different risk continued until the volunteers' participation ended: when they disembarked from the floats or were no longer marching in the parade.

The existence of coverage on the dec page for "Exhibitions - Outside" does not change the Court's opinion. The Chamber obtained this coverage to insure itself against claims by Festival *patrons* (e.g., injuries caused by third-party participants such as vendors, etc.). Thus, the fact that the

---

a concert at Carnegie Hall, persons or property involved in that event will, at the end of that involvement, be expected to go elsewhere[.]" and that the act of following a performer out into the parking lot after the show has ended does not extend the meaning of the term "event" beyond its normal boundaries. (DE #14.) The focus of the inquiry is not necessarily the definition of the term "event," but the determination of Clem's "participation in" the event. The fact that a specific portion of an event has ended does not mean that everyone's *participation* in the event has ended. Here, while the parade may have ended for the spectators at the officially-designated termination point, it had not necessarily ended for the volunteers riding on the floats.

CGL Policy was, in terms of premium dollars paid, obtained primarily for the Festival does not mean that the Participants Exclusion renders that coverage a sham; as suggested by the plaintiffs. Based on the above, the Court finds that the only reasonable interpretation of the Participants Exclusion, as applied to the facts of this case, is to conclude that Clem was injured "while. . . participating in any contest, demonstration, event, exhibition, race or show" and, thus, the exclusion applies.

IV. CONCLUSION

The Court finds that the CGL Policy at issue did not provide coverage for the injuries Clem sustained or his resulting death. Accordingly, the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS that

(1) the plaintiffs' motion for partial judgment on the pleadings or for partial summary judgment [DE #5] is DENIED;

(2) the defendant's motion for summary judgment [DE #6] is GRANTED;

(3) the plaintiffs' motion for leave to file supplement to the defendant's reply [DE #14] is DENIED as MOOT;

(4) a judgment will be tendered herewith; and

(5) this opinion and order shall be SEALED by the Clerk of Court and electronic access limited to the parties in this matter and their counsel.

This 6th day of January, 2005.

/s/
KARL S. FORESTER, CHIEF JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 04-274-KSF

[Filed January 6, 2006]

ESTATE OF LESLIE HARRISON CLEM, JR., deceased, by and through Administrator Leslie Clem, St., *et al.*
PLAINTIFFS

V.

WESTERN HERITAGE INSURANCE CO.
DEFENDANT

JUDGMENT

In accordance with the opinion and order entered contemporaneously herewith, the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS that

(1) the plaintiffs' claims against the defendant are DISMISSED WITH PREJUDICE and the plaintiffs shall take nothing thereby;

(2) judgment is entered in favor of the defendant;

(3) this matter STRICKEN from the active docket of the Court; and

(4) this is a final and appealable judgment.

This is a final and appealable judgment.

This 6th day of January, 2005.

/s/
KARL S. FORESTER, CHIEF JUDGE

APPENDIX F

CONFIDENTIAL SETTLEMENT AGREEMENT

This Confidential Settlement Agreement, made and entered into this 25th day of August, 2003, between First Parties (consisting of Janet Clem, Leslie Harrison Clem, Sr. and the Estate of Leslie Harrison Clem, Jr.) and Second Party (the Jessamine County Chamber of Commerce, Inc).

WITNESSETH: That,

WHEREAS, civil litigation has been instituted by First Parties and against both the Second Party and other litigants, arising out of an incident which occurred on October 6, 2001 and culminating in the death of Leslie Harrison Clem, Jr., an infant, now deceased;

WHEREAS, the Second Party had in force at the time of said occurrence, certain policies of liability insurance issued by various insurers, all enunciating obligations of indemnification and duty to defend the Second Party, subject to the terms and conditions set forth therein;

WHEREAS, said insurers have denied any duty to indemnify and/or defend the Second Party respecting said incident, placing the latter in a position of heightened jeopardy with respect to the potential outcome of said litigation; and

WHEREAS, the parties seek by this instrument to resolve their differences with respect to such claims,

NOW THEREFORE:

It is hereby AGREED by the parties, in mutual consideration of the various promises, conditions and provisions set forth hereinbelow, and other good and valuable consideration, the receipt and adequacy of which is acknowledged by the parties, as follows:

1. That in lieu of an Agreed Judgment and companion assignment to the same effect,

A. The Second Party agrees by this instrument to pay unto the First Parties the following sums (the "settlement amount") with respect to the pending claims against it: $500,000,00 with respect to each of the two claims for loss of parental consortium; $4,000.000.00 with respect to the estate's claim for wrongful death; and $1,000,000,00 with respect to the decedent's "survivor's" claim for damages incurred prior to this death. Notwithstanding the foregoing, no attempt shall be undertaken by the First Parties toward collection of the settlement amount above-mentioned from the Second Party, except as outlined below in paragraph "B" and failure of the Second Party to personally pay such amounts voluntarily shall not constitute a material breach of this agreement nor operate to invalidate its other terms.

AND

B. The Second Party does hereby fully and completely assign, transfer and convey to First Parties, any and all claims and rights of recourse which it may have against any liability carrier by which it was insured on the date of the occurrence

aforementioned, of whatsoever nature or kind, whether such rights may arise by contract or in tort, in equity or at law, or otherwise, and without limitation of any kind. Said assignment shall include, but not be limited to, the Second Party's rights to indemnification for liabilities respecting the occurrence in question; its obligations under this instrument; and to reimbursement for amounts incurred by the Second Party in defense of the pending action, and extra-contractual claims for bad faith, and for extracontractual damages. Provided, however, that First Party agrees to reimburse Second Party the actual amount of reasonable attorney fees incurred to date, not to exceed TWELVE THOUSAND FIVE HUNDRED DOLLARS ($12,500.00), from any net recovery actually recovered from Second Parties' aforementioned liability insurers, and subject to a proportionate share of fees and costs incurred by the First Parties in that regard.

2. That except as specifically set forth in this within paragraph, the parties to this agreement, and their agents and representatives, shall hold the fact, amount and terms of this agreement STRICTLY CONFIDENTIAL. It is understood, however, that the foregoing prohibition shall not operate to preclude either party from making such partial or full disclosure as may be necessitated by discovery obligations related to litigation; for purposes of financial or fiduciary purposes; enforcement of the rights of recourse assigned hereunder; or, in the case of the First Parties, as they may deem such disclosure appropriate and incidental to settlement negotiations with any other litigant in the pending litigation. Further, and notwithstanding the aforementioned prohibition, the Second Party shall be permitted, to the extent it deems desirable, to issue a public statement explaining its departure from the pending litigation as the product of settlement and/or financial necessity; stating its continuing belief as to its lack of fault respecting the occurrence aforementioned; but in no

event shall such statement include disclosure of the amount or terms of this agreement, or disparage the First Parties or their decision to either institute or compromise its claims against the Second Party or any other litigant.

3. That except as to the various conditions and considerations specifically set forth herein, Second Party is hereby fully released and discharged by the First Parties from any obligation or liability respecting the occurrence aforementioned, and nothing hereunder shall be deemed or construed as an admission of liability on the part of the Second Party, same being specifically denied. This release shall not be deemed release of any of Second Party's liability insurers, against whom all rights and claims are expressly reserved.

4. It is fully understood and agreed by the parties that the consideration received by the First Parties hereunder, or any amount recovered in assertion of rights assigned, is not and shall not be construed as full satisfaction of the various claims asserted in the pending litigation and, in addition to the claims and rights of recourse assigned hereunder, the First Parties expressly reserve and retain all such rights and claims against any and all other parties to the pending litigation and arising from the same occurrence mentioned.

5. That the parties shall execute an Agreed Order, dismissing all claims heretofore asserted by the First Parties and against the Second Patty, with prejudice, and with each such party bearing their own costs. Likewise, and to the extent necessary or appropriate, the parties shall execute such ether instruments as may be implicated by the intent, purpose and terms of this agreement, and such consent to execute further instruments shall not be unreasonably withheld.

6. The Second Party shall, prior to execution of this instrument, enact a proper resolution, consistent with its Articles of Incorporation and Bylaws, fully authorizing its signatory hereinbelow to execute same on behalf of the Second Party. Contemporaneous with the execution of this Instrument, the Second Party shall provide the First Parties with a true and correct copy of said resolution and an opinion of its counsel confirming the validity, authority and enforceability of same.

7. Each provision of this agreement shall be considered severable. If for any reason, any provision or provisions hereof are determined to be invalid or contrary to law, such invalidity shall not impair the operation of or affect the remaining provisions of this agreement.

Made and entered into this 8th day of September, 2003.

FIRST PARTIES	SECOND PARTY
/s/	By: /s/
JANET CLEM, INDIVIDUALLY	Office: /s/ President
	JESSAMINE COUNTY CHAMBER OF COMMERCE, INC
/s/	By: /s/
LESLIE HARRISON CLEM, SR. INDIVIDUALLY	Office: /s/ President
	JESSAMINE COUNTY CHAMBER OF COMMERCE, INC

/s/
LESLIE HARRISON
CLEM, SR.,
ADMINISTRATOR OF
THE ESTATE OF
LESLIE HARRISON CLEM, JR.

APPENDIX G

AFFIDAVIT

Comes now Nancy Stone, after first being duly sworn, and states the following:

1. My name is Nancy Stone. I am of majority age and I am competent to testify to the matters contained herein based upon personal knowledge.

2. Throughout 2001, I was the executive director of the Jessamine County Chamber of Commerce, Inc. ("Chamber"). During that period, the Jessamine Jamboree, to occur October 1-7, 2001, was the only special event sponsored, planned and organized by the Chamber. During that same period, the Chamber's offices were located at 611 North Main Street, Nicholasville, Kentucky, and it was at this location that the Chamber performed its work, including the planning and organization of the Jessamine Jamboree.

3. Among the attractions for the Jessamine Jamboree was the "Parade on Main", with same scheduled for October 6, 2001. Attached hereto are true and accurate copies of both the parade permit which the Chamber obtained, and the media advertisements published and disseminated by the Chamber and appearing in such publications as the Jessamine Journal. While the permit would have allowed us to extend the parade over the entire length of Main Street in Nicholasville, Kentucky (or "old" US 27) had the Chamber wished, it also permitted the Chamber to restrict the parade route to a shorter distance. As the other attachments indicate, the Chamber

specifically limited the parade route to one originating on North Main Street near McDonald's and ending on South Main Street in front of Kroger's.

4. After receiving an inquiry from an attorney representing the Clem family, this was passed on to the Chamber's insurance agent. Subsequently, and by way of a letter dated January 16, 2002, the Chamber was informed by its insurer, Western Heritage Insurance Co., that it was denying coverage to the Chamber respecting any liabilities that it might have in connection with Leslie Clem, Jr.'s death. By way of that same letter, however, the Chamber was requested to notify Western Heritage of any litigation.

5. In September, 2002, the Chamber was served with a lawsuit filed on behalf of various members of the Clem family, and against the Chamber (and others). The Chamber notified Western Heritage of the lawsuit, and provided a copy of the Complaint. By way of a letter dated October 18, 2002, Western Heritage again informed the Chamber that it was denying coverage under its policy, and would not provide a defense to the suit.

6. In light of the above, the Chamber engaged Barry Miller of Fowler, Measle & Bell to represent the Chamber in the litigation just mentioned. That representation continued up through a settlement of the claims against the Chamber and by way of the Confidential Settlement Agreement, dated August 25, 2003, a copy of which is attached hereto. Also attached is a copy of a statement from Mr. Miller's firm, setting forth the fees and expenses charged for that representation. Those charges were paid by the Chamber.

Further the Affiant sayeth naught.

/s/
Nancy Stone

STATE OF Kentucky)
COUNTY OF Jessamine)

The foregoing was subscribed, sworn and acknowledged to before me by Nancy Stone on this the 2 day of July, 2004.

/s/ Welda Grant
NOTARY PUBLIC, STATE AT LARGE
My Commission Expires: 10-13-07

See Fold-Out Exhibits

Attachment 1

FROM : FAX NO. : Sep. 28 2001 09:21PM P2

09/27/01 11:13 FAX 859 246 2354 DEPT HWY D-7 002

KENTUCKY TRANSPORTATION CABINET
Department of Highways
Permits Branch

TC 88-1
Rev. 3/99

Released Date _____

ENCROACHMENT PERMIT PERMIT NO. 07-0746-01

APPLICANT IDENTIFICATION:
NAME: Jessamine County Chamber of Commerce
PERSON: Chris McCauley
ADDRESS: 611 North Main Street
CITY: Nicholasville
STATE: KY ZIP CODE: 40356
PHONE: area code (859) 887-4151

PROJECT IDENTIFICATION:
ACCESS CONTROL: ☒ By Permit ☐ Partial ☐ Full
COUNTY: Jessamine PRIORITY ROUTE NO.: US 27X
MILEPOINT: 2.0 ☒ Left ☒ Right ☒ Ramp
PROJECT STATUS: ☒ Maint. ☐ Const. ☐ Design
PROJECT # STATE: HP 057-027X-002.000
PROJECT # FEDERAL: _____
ROAD/STREET NAME: Main Street

TYPE OF ENCROACHMENT:
☐ COMMERCIAL ENTRANCE - BUSINESS _____
☐ PRIVATE ENTRANCE: ☐ Single Family ☐ Farm
☐ UTILITY: ☐ Overhead ☐ Underground
☐ GRADE: ☐ Fill ☐ Landscape on R/W
☐ AIRSPACE: ☐ Agreement ☐ Lease
☒ OTHER: (Specify) To Close off Main Street for a parade on Oct. 6, 2001 going North to South Main

TYPE OF INDEMNITY: ☐ Bond ☐ Cash
☐ SELF-INSURED AMOUNT ENCUMBERED $ Waived
☐ OTHER _____

NAME AND ADDRESS OF LOCAL INSURANCE AGENCY OR SELF-INSURED REPRESENTATIVE: Austin Lafferty Insurance Agency

ATTACHMENTS:
☐ Standard Drawings (List on TC 88-31 under Misc.)
☐ Applicant's Plans
☐ Highway Plan and Profile Sheets
☐ TC 88-3 (Parallel Encroachment Specs. & Conditions)
☐ TC 88-4 (Rest Area Usage Specs. & Conditions)
☐ TC 88-5 (Tree Cutting/Trimming Specs. & Conditions)
☐ TC 88-6 (Chemical Use of Specs. & Conditions)
☐ TC 88-10 (Typical Hwy. Swing Crossing Detail)
☐ TC 88-12 (Overhead Utility Encroachment Diagram)
☐ TC 88-13 (Railroad Reimbursement Methods)
☐ TC 88-21 (Encroachment Permit General Notes & Specs.)
☐ TC 88-22 (Agreement for Services to be Performed)
☐ TC 88-23 (Mass Transit Shelter Specs. & Conditions)
☒ Other Attachments (Specify): Chapter 18 Regulations

INDEMNITY: The applicant, in order to secure this obligation, has deposited with the Transportation Cabinet as a guarantee of performance with the Department's Encroachment Permit requirements, an indemnity in the amount of $ _____ as determined by the Department. It shall be the responsibility of the applicant or permittee, his heirs and assignees to keep all indemnities in full force until construction or reconstruction has been completed and duly accepted by an authorized agent of the Transportation Cabinet, Department of Highways.

BRIEF DESCRIPTION OF WORK TO BE DONE: (If private entrance, show distance with pipe location. If private entrance, show distance with pipe location. If parallel encroachment, show distance with pipe location. If parallel encroachment, show distance with pipe location. If parallel encroachment

APP NO 07-0746-01

TC-95-1
Rev. 3/98

The permittee agrees to the following terms and conditions:

1. The permittee shall comply with and be bound by the requirements of the Department's *Permit Manual* as revised to and in effect on the date of the issuance of this permit which is made a part hereof by reference.

2. Permittee agrees that if the Department determines that vehicular capacity, deficiencies or new capacity conditions develop as a result of the installation and use of this facility, the permittee shall relocate, relocate, or reconstruct the facilities and/or provide and bear the expenses for signs, auxiliary lanes, or other corrective measures not formally deemed necessary by the Department and as set forth in the Department's Permit Manual within a reasonable length of time after receipt of written notice requesting such appurtenances, relocations, additions, modifications, and/or corrective measures, such time to be specified in the notice. In cases where no life signals are permitted or required, as determined by the Department, the costs for signal equipment and installation(s) shall be borne by the permittee except the Department in accordance with Department policy does have in force as set forth in the Traffic Manual. Any modifications to the permittee's entrances necessary to accommodate signalization (including necessary easement(s) on private property) shall be the responsibility of the permittee, at no expense to the Department. (This applies only to Entrance Permits.)

3. This valid entrance permit will not infringe on the frontage rights of an abutting owner without written consent of the said owner as herein: "I (we) consent to the granting of affected points" _____ Date _____ (This does not apply to utilities which serve the general public.)

4. Any person placed hereunder shall be with this not understanding that it shall not infringe with any similar rights or permits heretofore granted to any other party except as otherwise provided by law.

5. A plan prepared by _____ and dated _____, is attached hereto and made a part hereof, which describes the facilities to be constructed by the permittee for which facilities this permit is granted. The permittee agrees as a condition to the issuance of the permit to construct and maintain such facilities in accordance with said plan, and the permittee shall not use the facilities authorized herein in any manner contrary to that prescribed by this permit and plan. Normal cleanup and routine maintenance only are authorized under this permit.

6. Permittee shall comply with the Manual on Uniform Traffic Control Devices as revised to and in effect on the date of the issuance of this permit which is made a part hereof by reference.

7. Permittee shall at all times does does date retain sole in first instance and until such time as all facilities are removed from the right-of-way premises, defend, protect, and save harmless the Department from all liability, claims, and demands arising out of work undertaken by the permittee pursuant to this permit, due to any negligent act or omission by the permittee, its servants, agents, employees, or contractors. This provision shall not inure to the benefit of any third party or operate to enlarge any liability of the Department beyond that existing at common law if this right is not already did not exist.

8. Upon a violation of any of the provisions of this permit, the Department may revoke the permit by giving notice to the permittee in writing to remove from the right-of-way any its chattels placed thereon within a reasonable time as set forth in the notice, and in the event said facilities are not so removed, and the right-of-way lines of the Department may cause same to be so removed, and the costs thereof shall be charged to the permittee.

9. The permittee, his successors and assigns shall use the over-and-around premises in compliance with all Federal requirements imposed pursuant to the provisions of the Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000-d) and regulations of the U.S. Department of Transportation as set forth in Title 49 C.F.R., Part 21, and as said regulations may be amended.

10. Permittee agrees that in the event it should become necessary, as may be reasonably determined by the Department, for the facilities covered by this permit to be removed or relocated in connection with the reconstruction, relocation, or improvement of the abutting highway, the Department may revoke this permit and require removal or relocation by the permittee at his own expense according and pursuant to the provisions provided in Paragraph 8 above except in those cases where the Department is required by law to pay any or all the same.

11. The permittee understands and agrees that this permit is personal to the permittee and shall not inure to his successors and assigns without the written approval of the Department that he is bound by the provisions of this permit as long as the encroachment exists Unless a written release has been obtained from the Department. (Does not apply to utilities serving the general public.)

12. If the work authorized by this permit is on a project in the construction phase, it shall be the responsibility of the permittee to make personal contact with Resident Engineer on the project to coordinate the permitted work with the State's prime contractor on the project.

13. This permit does not relieve any requirements of any other government agency.

14. Permittee agrees to keep the job/site in which this permit was issued clear of dirt, mud, and debris during construction and for the life of this permit.

THE UNDERSIGNED APPLICANT (being duly authorized to presently business) DOES AGREE TO ALL TERMS AND CONDITIONS SET FORTH HEREIN.

October 8, 2001

Completion Date

Oct. 16 2001

Date

Larry D. Stone

Signature

RECOMMENDED FOR APPROVAL

PERMIT ENGR

Title

D. R. Treadway

Signature

Chief District Engineer (DRT)

9-30 20 01

Date

PRIVATE ENTRANCE: TO BE COMPLETED BY PERSONNEL INSTALLING FACILITY.

Installed By:

Title

Signature

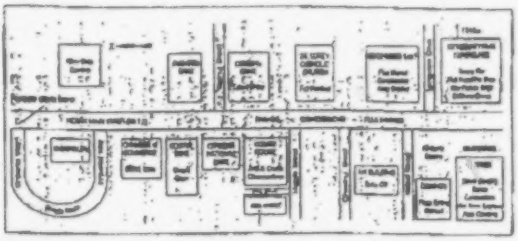
Date 20

FROM : 08:27:01 11:20 FAX NO. : DEPT MNTS D-7 Sep. 28 2001 05:22PM P3

Attachment 2

Attachment 3

Schedule of Events • Oct. 1 - 7 • Carnival: 6 p.m.



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EVERYONE'S GOING TO THE

"HALLELUJAH JAMBOREE"

Sunday Night • Sept. 30 • 5:00 p.m.

To kick-off The Jessamine Jamboree

Under the "BIG TENT"

FREE TO THE PUBLIC
FREE REFRESHMENTS
PLENTY OF FREE PARKING!

The Finest in Bluegrass & Southern Gospel Music

FEATURING...

Solid Ground, Devoted, David Waits, Potter's Clay, Messengers Quartet, Destination Heaven, Brighter Day, The Blevins Family

For more information or further directions, please call 887-8757

Ya'll Come . . . You Hear!!

YOU DON'T WANT TO MISS THIS!

Twenty-Second Annual

JESSAMINE JAMBOREE

"Shine Jessamine Shine"

October 1 - 7

Carnival 6:00 P.M.

WEDNESDAY, OCTOBER 3

6:00 p.m. Carnival
Wm. Dixie Lot - North Main Street
7:00 p.m. Miss Jessamine Jamboree
Beverly Pageant
Stage at Kroger Lot - South Main Street
(Sponsored by Forever Bank)

THURSDAY, OCTOBER 4

6:00 p.m. Carnival
Wm. Dixie Lot - North Main Street
7:00 p.m. Miss Jessamine Jamboree
Beverly Pageant
Stage at Kroger Lot - South Main Street
(Sponsored by Trim Masters)

FRIDAY, OCTOBER 5

All Day Mini Train Ride
Kroger Lot - South Main Street
All Day Rock Climbing
Kroger Lot (25 foot wall) - South Main St
All Day Arts & Crafts
Courthouse
All Day The Market & Concessions
Downtown and Edgewood Mall
All Day Carnival
Wm. Dixie Lot - North Main St.
All Day Sidewalk Sale
Main Street Business

All Day Live Music Performances
Carl's Furniture
All Day Jessamine Co. Farm Equipment Show
Williams Brothers Lot - South Main St.
1:00 p.m. Children's Games
City County Park
(Sponsored by Jessamine County Parks & Recreation)
1:00 p.m. St. Luke's Fall Festival
St. Luke's Church Lot - South Main St
(Sponsored By St. Luke's Church)
2:00 p.m. Mutt Race
City-County Park
(Sponsored by Southern States)
3:00 p.m. Entries for Bake-Off
4-H Building
(Sponsored by Jess. Co. Homemakers)
4:30 p.m. Bake-Off Judging
4-H Building
(Sponsored by Jess. Co. Homemakers)
6:00 p.m. Gospel Show
Central Bank Lot - North Main Street
(Sponsored by Central Bank, H.J. Cowan, and Taylor Made Farm)
6-11:00 p.m. Bingo & Karaoke
St. Luke's Church Lot - South Main St.
(Sponsored by St. Luke's Church)
7:00 p.m. Talent Show
Corner of North Main & West Maple
(Sponsored by Citizens National Bank Of Jessamine County)
7:00 p.m. Z Cool Band
Stage at Kroger Lot - South Main Street
8:00 p.m. Diana's Dancers
Hardee's Parking Lot - South Main Street

SATURDAY, OCTOBER 6

All Day Mini Train Ride
Kroger Lot - South Main Street
All Day Rock Climbing
Kroger Lot (25 foot wall) - South Main St.
All Day Arts & Crafts
Courthouse
All Day The Market & Concessions
Downtown and Edgewood Mall
All Day Carnival
Wm. Dixie Lot - North Main St.
All Day Sidewalk Sale
All Business Locations
All Day Live Music Performances
Carl's Furniture
All Day Jessamine Co. Farm Equipment Show
Williams Brothers Lot - South Main St.
All Day St. Luke's Fall Festival
St. Luke's Church Lot - South Main St.
(Sponsored by St. Luke's Church)
10:00 a.m. Jamboree Parade
North Main Street to South Main Street
2:00 p.m. Spelling Bee
Bank One Lot - Hobel Road
(Sponsored by Jessamine Co. Board of Education)
3:00 p.m. Tomato War
City County Park
(Sponsored by Kroger)
3:00 p.m. Karate Demonstration
All Day Sponsored by Hoi Ubudile Tae Kwon Do
Stage to Kroger Lot - South Main Street
4:00 p.m. The Blue Daisy Band
Stage at Kroger Lot - South Main Street
(Sponsored by Bluegrass Energy)
7:00 p.m. Bingo & Karaoke
St. Luke's Church Lot - South Main St
(Sponsored by St. Luke's Church)
7:30 p.m. Becky Montgomery Whitaker
Stage at Kroger Lot - South Main Street
8:30 p.m. Liquid Snake
Veal Barking - South Main Street
(Sponsored by Outlaw Group Rockers and J.D. Lovell's)
9:30 p.m. David Delaney
Bingo at Kroger Lot - South Main St

SUNDAY, OCTOBER 7

1:30 p.m. Pet Show
City County Park
(Sponsored by Jessamine County Humane Society)
2:00 p.m. Diana's Dancers
Hardee's Parking Lot - South Main Street

Hope to see you next year at the 23rd Annual Jessamine Jamboree October 4-5, 2002

Sponsored by the Jessamine County Chamber Of Commerce

JESSAMINE BUSINESS PROFESSIONAL INDUSTRIAL EDUCATIONAL CHAMBER OF COMMERCE JCC

Attachment 4

Attachment 5

Client: Jessamine Jamboree
Spot Title: Jamboree 2001
Date: 8/20/01
Producer: Landon

VIDEO	AUDIO
PICTURES OF JAMBOREE WITH GRAPHICS FEATURING DATES AND ACTIVITIES.	JOIN WITH FAMILY AND FRIENDS AND LET YOUR SPIRIT SHINE, JESSAMINE, SHINE AT THE 22ND ANNUAL JESSAMINE JAMBOREE. THE FUN ABOUNDS WITH ARTS AND CRAFTS, ENTERTAINMENT, FOOD, A PARADE AND THE TRADITIONAL TOMATO WAR. PLUS THEY'LL BE CONCERTS FEATURING BLUE DAWG, BECKY MONTGOMERY AND BLUEGRASS, COUNTRY AND GOSPEL PERFORMANCES. ENJOY WHOLESOME FAMILY FUN ON MAIN STREET IN NICHOLASVILLE DURING THE JESSAMINE JAMBOREE, OCTOBER 5TH AND 6TH. COME OUT AND LETS SHOW HOW WE CAN SHINE, JESSAMINE, SHINE.
TAG STATING "PAID FOR BY NICHOLASVILLE TOURISM COMMISSION	

Attachment 6

Jessamine Jamboree Committee for 2001

OFFICERS

Chairperson
Mike Sloan
Executive Director
Nancy Stone

COMMITTEE

Bob Bell
Jean Bell
Jeff Bell
Earl Boggs
John Bowerman
Kelly Burczyk
Gary Burdette
Judge Neal Cassity
Tammy Cobb
Richard Collins
Mayor Sam Cowman
Kay Dawson
Donaldson Company
Rev. Josh Erwerth
Doug Fain
Robin Fauk
Rayn Floyd
Robert Garrison
Stanley Gillespie
Jo Hale
Wanda Horton
Frank Hubbard
Ray Lamb
Brenda Lawson
Freda Lear
Larry Lewis
Eve Joyce McDavid
Bobby Mahoyo
Alison Meyer
Donna Miller
Ray Moss
Ellen Pickston
Bobby Reed
Nancy Reed
Jerry Sims
Dewitt Smith
James Stamm
John Swaim
Buddy Tanner
Chief Jerry Waldrop
Gerald Walton
Judy Woods

Thank you for coming. We hope you have a wonderful time!

Jamboree in its 22nd year

It's the time of year for fleets and farmall cubes, tractors, karate and karaoke.

It's the 22nd annual Jessamine Jamboree, which will be held Oct. 1-7 in downtown Nicholasville.

The county's fall festival draws thousands of people each year, not only from Jessamine County and nearby communities, but from throughout the United States, as former residents return home or relatives and friends come to visit.

The festival began in 1980 with an attendance of 30,000 people. Last year there were an estimated 70,000.

This year, Mike Sloan, president of the Jessamine County Chamber of Commerce, is the new chairman of the Jessamine Jamboree Committee. The event is organized each year by the chamber and tourism center.

One of the highlights of the Jamboree, the Grand Parade on Main Street, is scheduled for 10 a.m. on Oct. 6.

Most events during the Jamboree are free.

A map and complete schedule of the weekend's activities are included in this special section of the Journal.

The Jessamine County Chamber of Commerce invites everyone to come and enjoy the 2001 Jessamine Jamboree.

Welcome from Jessamine County officials

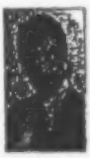
Tourists and residents:

Welcome to Nicholasville for our city's 22nd annual Kentucky fall festival — the Jessamine Jamboree!

While you are here, take time to enjoy our fine dining, antique malls and gift shops. On your walking tour of our town, enjoy the beautiful architectural features of our historic buildings.

Thank you for visiting us, and may your stay be safe and enjoyable.

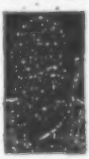
—Mayor Sam Cowman



Welcome to Jessamine County and the Jessamine Jamboree. While you are in beautiful Central Kentucky, be sure to also visit Nathnic Wilmore and High Bridge, Asbury College, Asbury Theological Seminary, Veterans Center and Wesley Village. Come downtown and check out the flowers along Main Street, and be sure to check out the newly-constructed High Bridge Pavilion.

Welcome to our wonderful Jessamine County!

—Harold Rabenaker, Mayor of Wilmore



The Jessamine Jamboree is an exciting time of the year for our county as we celebrate good times, see old friends, and welcome visitors to Jessamine County.

—William Neal Cassity, Jessamine County Judge Executive

Proud to Support
The 2001
Jessamine Jamboree

Donaldson Company, Inc.
200 Etter Drive, Nicholasville, KY 40356 • (859) 887-2426

Welcome!

Tourists and Residents,

Welcome to Nicholasville for the 22nd annual Kentucky Fall Festival – the JESSAMINE JAMBOREE.

While you are here, take time to enjoy our fine dining, our antique malls, and our gift shops. On your walking tour of our area, enjoy the beautiful architectural features or our historical buildings.

Thank you for visiting us, and may your stay be safe and enjoyable.

SAM CORMAN
Mayor of Nicholasville

Welcome to Jessamine County and the Jessamine Jamboree. While you are in beautiful Central Kentucky, be sure to also visit historic Wilmore & High Bridge, Asbury College, Asbury Theological Seminary, Veterans Center, and Wesley Village. Come downtown and check out the flowers along Main Street, and be sure to check out the newly-constructed High Bridge Pavilion.

Welcome to our wonderful Jessamine County!

HAROLD RAINWATER
Mayor of Wilmore

The Jessamine Jamboree is an exciting time of the year for our county as we celebrate good times, see old friends, and welcome visitors to Jessamine County.

WILLIAM NEAL CASSITY
Jessamine County Judge Executive

JESSAMINE JAMBOREE COMMITTEE FOR 2001

OFFICERS

Chairperson ..... Mike Sloan
Parade Chairmen ..... Tim Pilce & Mike Samaan
Executive Director ..... Nancy Stone

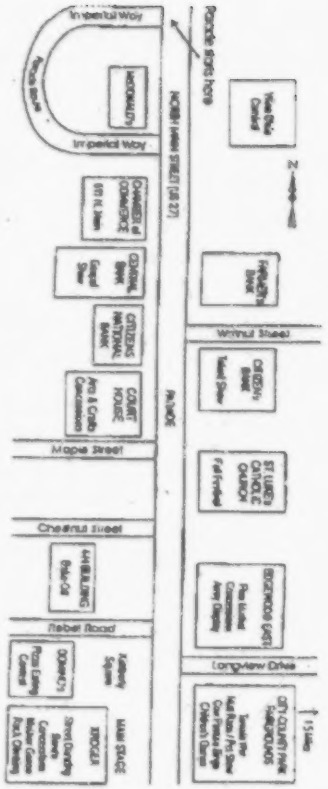
COMMITTEE MEMBERS

Bob Ball
Jane Ball
Jeff Ball
Earl Boggs
John Branscum
Kelly Burczyk
Gary Burdine
Judge Neal Cassidy
Tommy Cobb
Richard Collins
Mayor Sam Corman
Kay Damoss
Donaldson Company
Rev. Jack Emerick
Doug Fein
Robin Feck
Kaye Floyd
Robert Garrison
Stanley Gillispie
Lin Hale
Vonda Horton
Frank Hubbard
Roy Lamb
Brenda Lawson
Freida Lear
Larry Lewis
Eva Joyce McDaniel
Bobby McIntyre
Alison Meyer
Donna Miller
Ray Moss
Ellen Pinkston
Bobby Reed
Nancy Reed
Larry Sims
Dennis Smith
James Staton
John Swain
Buddy Teater
Chief Barry Waldrop
Gerald Walton
Judy Woods

JAWS
Communication System

Jessamine Amateur Wireless Society (JAWS) will provide communication for the Jamboree for the twelvth year.

JAWS was organized more than twenty years ago with only four members. Now there are more than 1,000 members ranging in age from 12 to 80.



TWENTY-SECOND ANNUAL

JESSAMINE JAMBOREE

Nicholasville, Kentucky
October 1–7, 2001

"Shine Jessamine Shine"

Sponsored by the
JESSAMINE COUNTY CHAMBER OF COMMERCE

[redacted]

Attachment 7

JESSAMINE JAMBOREE

October 1—7

Carnival:
6:00 pm

Wednesday, Oct. 3

6:00 pm — Carnival
Winn Dixie Lot — North Main Street

7:00 pm — Miss Jessamine Jamboree Beauty Pageant
Stage at Kroger Lot — South Main Street
(Sponsored by Farmers Bank)

Thursday, Oct. 4

4:00 pm — Carnival
Winn Dixie Lot — North Main Street

7:00 pm — Mrs. Jessamine Jamboree Beauty Pageant
Stage at Kroger Lot — South Main Street
(Sponsored by Triton Masters)

Friday, Oct. 5

All Day — Mini Train Ride
Kroger Lot — South Main Street

All Day — Rock Climbing
Kroger Lot (25-foot wall) — South Main Street

All Day — Arts & Crafts
Court House

All Day — Flea Market & Concessions
Downtown and Edgewood East

All Day — Carnival
Winn Dixie Lot — North Main Street

All Day — Sidewalk Sale
All Business Locations

All Day — Live Music Performances
Carl's Furniture

All Day — Jessamine County Farm Equipment Show
Williams Brothers Lot — South Main Street

1:00 pm — Children's Games
City-County Park
(Sponsored by Jess. Co. Parks & Recreation)

1:00 pm — St. Luke's Fall Festival
St. Luke's Church Lot — South Main Street
(Sponsored by St. Luke's Church)

2:00 pm — Mutt Race
City-County Park
(Sponsored by Southern States)

3:00 pm — Entries for Bake-Off
4-H Building
(Sponsored by Jess. Co. Homemakers)

4:30 pm — Bake-Off Judging
4-H Building
(Sponsored by Jess. Co. Homemakers)

6:00 pm — Gospel Show
Central Bank Lot — North Main Street
(Sponsored by Central Bank, R.J. Corman, and Taylor Made Farm)

6-11:00 pm — Bingo & Karaoke
St. Luke's Church Lot — South Main Street
(Sponsored by St. Luke's Church)

7:00 pm — Talent Show
Corner of North Main & West Walnut
(Sponsored by Citizens Nat. Bank of Jess. Co.)

7:00 pm — 2 Cool Band
Stage at Kroger Lot — South Main Street

8:00 pm — Diane's Dancers
Harder's Parking Lot — South Main Street

Saturday, Oct. 6

All Day — Mini Train Ride
Kroger Lot — South Main Street

All Day — Rock Climbing
Kroger Lot (25-foot wall) — South Main Street

All Day — Arts & Crafts
Court House

All Day — Flea Market & Concessions
Downtown and Edgewood East

All Day — Carnival
Winn Dixie Lot — North Main Street

All Day — Sidewalk Sale
All Business Locations

All Day — Live Music Performances
Carl's Furniture

All Day — Jessamine County Farm Equipment Show
Williams Brothers Lot — South Main Street

All Day — St. Luke's Fall Festival
St. Luke's Church Lot — South Main Street
(Sponsored by St. Luke's Church)

10:00 am — Jamboree Parade
North Main Street to South Main Street

3:00 pm — Spelling Bee
Bank One Lot — Rebel Road
(Sponsored by Jess. Co. Board of Education)

3:00 pm — Tomato War
City-County Park
(Sponsored by Kroger)

3:00 pm — Karate Demonstration
4th Degree by Nicholasville Tae-Kwon-Do
Stage in Kroger Lot — South Main Street

4:00 pm — The Blue Dawg Band
Stage at Kroger Lot — South Main Street
(Sponsored by Bluegrass Energy)

7:00 pm — Bingo & Karaoke
St. Luke's Church Lot — South Main Street
(Sponsored by St. Luke's Church)

7:30 pm — Berky Montgomery Whitaker
Stage at Kroger Lot — South Main Street

8:30 pm — Liquid Snafu
Veal Building — South Main Street
(Sponsored by Re/Max Group Realtors and J.D. Legends)

9:30 p.m. — David Delaney
Stage at Kroger Lot — South Main Street

Sunday, Oct. 7

1:30 pm — Pet Show
City-County Park
(Sponsored by Jess. Co. Humane Society)

2:00 pm — Diane's Dancers
Harder's Parking Lot — South Main Street

"Thank You"
M & M Sanitation

Trash pick-up services this year are made available to the Jessamine Jamboree through the generous services of M & M Sanitation. Thank you M & M for being a good neighbor and citizen of Jessamine County.

Hope to see you next year at the 23rd Annual JESSAMINE JAMBOREE October 4—5, 2002

Attachment 8

Attachment 9

APPENDIX H

AFFIDAVIT

Comes now Stephen S. Simpson, after first being duly sworn, and states the following:

1. My name is Stephen S. ("Scott") Simpson. I am of majority age and I'm competent to testify to the matters contained herein based upon personal knowledge.

2. That at all times pertinent hereto, I was associated with Sayre & Associates Engineering and as an accident reconstructionist. My resume is appended hereto. In the spring of 2002, I was engaged by Howard Mann and requested to analyze an accident which had taken place on October 6, 2001 and in which Leslie Clem, Jr. sustained fatal injuries. The resulting preliminary report is appended hereto. The material and information which I considered in preparing my report, and noted in its text, is that of the kind and type usually and customarily relied upon by experts in my field.

3. As reflected in my report, I was able to utilize landmarks depicted in the photographs (which also depicted the trailer still elevated) by which to ascertain the location of the vehicle as it sat at rest and with Leslie Clem, Jr. below. Likewise, utilizing measurements of the involved tractor and trailer, I was able to determine the location of the front end of the tractor; the wheels of the trailer (with a distance of 4.5 feet between axles), located near its rear; and, likewise, the position of the victim. Utilizing a precision instrument and measuring from the western most edge of Main Street

(including its turn lane), I was able to measure the various distances to the tractor and trailer wheels. The distance to front of tractor was 246 feet; to rear axle of trailer was 175 feet; to the center trailer wheels was 179.5 feet; and, assuming that the victim was partially pinned by the center set of wheels and otherwise located between the first two sets of trailer wheels, the distance from Main Street to the victim would be between 179.5 and 181 feet.

4. Though not specifically stated in the report, something additional may be added, and concerning the forward motion of the vehicle, following the initial impact of the trailer wheels with the victim and until the vehicle came to a stop. While this distance would vary depending on whether Les Clem, Jr. fell in front of the first, rather than the second set of tires, that distance could not exceed the separation between the two sets of tires and certainly less than 10 feet. In any event, given the reportedly low speed of the vehicle and other factors, the placement of the victim when the vehicle came to rest should approximate the location of initial impact.

Further the Affiant sayeth naught.

/s/_____
Stephen S. Simpson

STATE OF Kentucky)
COUNTY OF Fayette)

The foregoing was subscribed, swom and ackn.owledged to before me by Stephen S. Simpson on this the 1st day of July, 2004.

/s/
NOTARY PUBLIC, STATE AT LARGE
My Commission Expires 5/19/08

SAYRE & ASSOCIATES ENGINEERING
629 North Broadway Lexington, KY 40508
(859) 259-1173 Fax (859) 233-1010
E-mail Sayreengr@aol.com

R. Vince Sayre, P. E.
Associates
S. Scott Simpson Frankfort, KY
Dennis Crawford Murray, Ky
Terry Hammond Elizabethtown, KY

June 26, 2002

Mr. Howard O. Mann
Attorney at Law
104 North Kentucky Street
P.O. Drawer 1344
Corbin, KY, 40702

Re: PRELIMINARY REPORT
Estate of Leslie Harrison Clem, Jr.
Date of Accident: October 6, 2001

Dear Mr. Mann:

At your request, I was engaged to make a physical examination of the accident scene and other pertinent facts related to the above referenced accident. To date I have reviewed or undertaken the following:

1. Preliminary Police report, dated October 8, 2001, with witness statements (a total of 21 pages);

2. Supplemental police report comprised of two pages;

3. Final accepted police report comprised of 29 pages;

4. Police Department photographs, approximately 28 in number;

4(a) Numerous other photographs, approximately 17 in number, of the tractor/trailer and accident site.

5. Jessamine County EMS records;

6. Nicholasville Fire Department records;

7. I have personally inspected, documented and photographed the accident site on Kimberly Heights Drive on numerous occasions;

7(a) I have also had a precision map of the accident scene constructed under my direction and control a copy of which is attached hereto;

8. I have physically inspected, documented and photographed the tractor, a 1999 Peterbilt (model 379 S.E.), owned and operated by Mr. Glenn Hensley and Glenn Hensley Trucking;

9. I have personally inspected, documented and photographed the trailer owned by CMC, Inc.;

10. I have conducted coefficient of friction tests to determine the tire/pavement interface friction at the accident site.

Based upon the physical evidence, my physical inspection and review of the above material, all of which is the type reasonably and customarily relied upon by accident reconstuctionists in this field, I can report to you the following, within a reasonable degree of probability:

1. The tractor is a 1999 Peterbilt, I.C.C. #198541, designed for heavy overland trucking. The tractor is equipped with air brakes. It has a wheel base of 270 inches.

2. The trailer is a Lindell Birmingham used primarily as a hauler of heavy equipment. It is 48.5 feet long and 8.5 feet wide. The trailer weighs approximately 12,000 pounds. The tires are a combination of Toyo, Goodyear and Bridgestone. The size is 255/70 22.5. They have a diameter of 36 inches. The height of the trailer at the point where Les Clem was sitting is 39 inches. The tire circumference is 113 inches.

3. The trailer has useable square footage area of approximately 288 square feet. With 71 passengers on the trailer, each passenger would have 4.0 square feet of space. This would not be useable space however because hay bales occupied a significant portion of the area.

4. There were no seats, restraint devices, guard rails, safety lines, or any passenger safety features on the trailer and the rear tire wells were open and exposed.

The accident occurred on Kimberly Heights Drive within the corporate city limits of Nicholasville, Kentucky, Jessamine

County. Kimberly Heights Drive is of asphalt construction and runs perpendicular to U.S. 27/Main Street and adjacent to the Kroger parking lot.

1. The roadway at the accident site is 22.5 feet wide. The Grade at the entrance to Kimberly Drive is 2.7% and .8% at the final rest position of the truck. The coefficient of friction in the accident area is .78.

2. The tractor/trailer came to a stop with the middle set of wheels resting on Les Clem's legs, pelvis and waist at a point 181 feet west of the intersection of U.S. 27/Main street and Kimberly Heights Drive. At the point of final rest the front of the tractor/trailer was 246 feet west of the intersection and the rear was 175 feet west.

3. There is a traffic control sign on Kimberly Heights Drive approximately 1/10 mile from the accident site prohibiting large trucks from operating on the street.

4. The surface area of that portion of the trailer which includes the exposed wheel wells is approximately 120 square feet or 41% of the total surface area of the trailer.

5. Unrestrained passengers on this trailer will be thrust rearward by any unexpected acceleration and forward by any unexpected deceleration. A very unstable situation.

This is a preliminary report based on the information I have to date. I reserve the right to amend this report if additional

information becomes available which could alter my conclusions. Thank you.

Respectfully yours;

/s/
S. Scott Simpson

APPENDIX I

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 85-CA-1592-MR

SADIE H. VANCE; BESSIE L. HACKER; and KENNETH MURPHY APPELLANTS	)
V.	)
THE CINCINNATI INSURANCE COMPANY, and RED ARROW DELIVERY, INC. APPELLEES	)

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
ACTION NO. 84-CI-1817

REVERSING AND REMANDING

BEFORE: COMBS, COOPER and MILLER, Judges.

MILLER, JUDGE. Appellants, Sadie H. Vance, Bessie L. Hacker, and Kenneth Murphy, bring this appeal from an adverse judgment of the Fayette Circuit Court entered in a declaratory judgment action filed by appellees, The Cincinnati

Insurance Company (Cincinnati) and Red Arrow Delivery, Inc. (Red Arrow).[1]

The facts of the case are these: Appellants Vance and Hacker were injured in an automobile accident involving a 1977 Dodge van owned by appellee, Red Arrow, and operated by appellant, Murphy. The accident occurred on Friday, April 23, 1982, at 9:00 p.m. Subsequently, both Vance and Hacker filed suit in the Madison Circuit Court against Murphy and Red Arrow. The suits alleged negligence on the part of Murphy, and that he operated the van as agent and employee of Red Arrow and with its consent and approval. The suits prayed damages against Murphy and Red Arrow jointly and severally.[2] At the time of the accident, the van was covered by a comprehensive automobile liability insurance policy issued by Cincinnati to Red Arrow and containing the following provisions:

> I. COVERAGE C--BODILY INJURY LIABILITY
> COVERAGE D--PROPERTY DAMAGE LIABILITY
>
> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> Coverage C. bodily injury or
> Coverage D. property damage

---

[1] We perceive that Red Arrow Delivery, Inc., has no direct interest in the issue presented on this appeal.

[2] Safeco Insurance Company, the no-fault carrier on Vance and Hacker, intervened to recoup payment of basic reparation benefits. KRS Chapter 304.39. Safeco takes no part, however, in the present appeal.

to which this insurance applies, caused by an occurrence and arising out of the ownership, maintenance or use, including loading and unloading, of any automobile, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false, or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements. (Emphasis added.)

. . .

II. PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

(a) the named insured;

(b) any partner or executive officer thereof, but with respect to a non-owned automobile only while such automobile is being used in the business of the named insured;

(c) any other person while using an owned automobile or a hired automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission . . . . (Emphasis added.)

The carrier investigated the accident and discovered an accident report filed by Murphy containing information to the effect that he (Murphy) took the van home, presumably after work on Friday, with the understanding not to use the van over the weekend. Armed with this information and further information obtained from Red Arrow that Murphy had no permission to use the vehicle at the time and place of the accident, Cincinnati chose not to defend the claims of Vance and Hacker against Murphy and chose only to defend Red Arrow. Murphy did not appear and defend. Subsequent thereto, and on May 24, 1984, with Murphy then appearing *pro se*, and in default an agreed judgment was entered awarding stipulated damages of $40,000 for Vance and $50,000 for Hacker -- all against Murphy.

On July 2, 1984, Cincinnati filed a complaint for declaratory judgment (KRS 418.040; CR 57) in the Fayette Circuit Court. Vance, Hacker and Murphy were named as defendants. Defendants interposed a claim of estoppel against Cincinnati based on the latter's refusal to defend Murphy against the claims of Vance and Hacker. On July 16, 1984, Murphy assigned his rights against Cincinnati to Vance and Hacker. By collateral agreement, Hacker and Vance agreed not to pursue collection of their judgments against Murphy.

The Fayette Circuit Court submitted to a jury the question ~~of~~ Murphy's permission to operate the van at the time of the accident. In an answer to an interrogatory, the jury decided that Murphy had no "express or implied permission" to operate the van at the time of the accident. Thereupon, on May 2, 1985, the circuit court entered judgment in favor of Cincinnati absolving it from liability under the terms of its policy.

Vance, Hacker and Murphy bring this appeal. The issue is clear: Whether Cincinnati, by having refused to defend Murphy, is estopped from asserting lack of permissive use under the terms of its policy, and, therefore, must honor the Vance and Hacker judgments.

It is well established in Kentucky and other jurisdictions that insurance policies of the type involved include two duties on the part of the insurer: the duty to defend and the duty to pay. The duties are mutually exclusive. *See Ursprung v. Safeco Ins. Co.*, Ky., 497 S.W.2d 726 (1973). Failure to perform either duty constitutes a breach of the contract on the part of the insurer. As articulated in *Maneikis v. St. Paul Ins. Co. of Illinois*, 655 F.2d 818, 821 (7th cir. 1981), "[o]nce an insurer violates its duty to defend, it is estopped to deny policy coverage in a subsequent lawsuit by the insured or the insured's assignee."

The duty to defend is broader than the duty to pay. *See Ursprung, supra*. The insurer must not only defend the named insured but also any other insured falling within the scope of the policy. *See Murphy v. Clancy*, 83 Ill. App. 3d 779, 404 N.E.2d 287 (1980), rev'd in part sub nom. *Murphy v. Urso*, 58 Ill.2d 444, 430 N.E.2d 1079 (1981) (reversing on other grounds). In *Wolford v. Wolford*, Ky., 662 S.W.2d 835, 838 (1984), our Supreme Court found that under an automobile liability policy, "[t]he insurance company must defend any suit in which the language of the complaint would bring it within policy coverage regardless of the merit of the action." (Emphasis added.) Faced with imminent litigation, the insurer has three options:

> "The insurer can (1) seek a declaratory judgment regarding its obligations before or pending trial of the underlying action, (2) defend the insured under a

> reservation of rights, or (3) refuse either to defend or to seek a declaratory judgment at the insurer's peril that it might later be found to have breached its duty to defend.

Maneikis, *supra* at 821.[3]

Cincinnati did not seek a declaratory judgment before or pending trial of the underlying action, nor did Cincinnati defend under a reservation of rights. Cincinnati refused to pursue the foregoing options and thus risked the possibility of breaching its duty to defend. Cincinnati contends that Murphy had no permission to use the vehicle at the time of the accident, that Murphy consequently was not covered by the policy, and that Cincinnati was therefore justified in refusing to defend Murphy. We disagree.

It is true that Cincinnati was claiming that Murphy was not a permissive user of the van, but that question could only be an issue in a suit to determine rights under the policy. It was not a relevant question in the tort action since permission in no way affected plaintiffs' (Vance and Hacker) recovery rights for personal injury against Murphy. In the tort action, plaintiffs' complaints alleged that Murphy was not only an agent and employee of Red Arrow, but also was a permissive user of the van at the time of the accident. Such averments, if true, clearly placed Murphy within the omnibus coverage provided in Section II(c) of Red Arrow's insurance policy.

---

[3] The Supreme Court of Kentucky recognized these options by citing that *Maneikis* interpreted the general rule of duty to defend as offering the insurer the option to defend under "reservation of rights." *O'Bannon v. Aetna Casualty & Surerty Co.*, Ky., 678 S.W.2d 390 (1984).

The Supreme Court of Kentucky found in *Wolford*, *supra*, that regardless of the result of the action, if the language of the complaint brings it within policy coverage, the insurance company must defend any such suit. The language of the complaints of Vance and Hacker--whether the claims were meritorious or not--brought the suit within the scope of Red Arrow's insurance policy and sparked Cincinnati's duty to defend not simply Red Arrow but also Murphy. Cincinnati refused to defend Murphy and thus proceeded at its own peril. The consequences are these: Cincinnati breached its duty to defend and is, therefore, estopped from asserting lack of permissive use under the terms of its policy. Cincinnati must therefore honor the Vance/Hacker judgments. We simply cannot allow Cincinnati the right to insist that the insured be bound by the provisions of the insurance contract inuring to its benefit, when Cincinnati has already breached the contract by violating the provisions that inure to the benefit of the insured. *Maneikis*, *supra*.

As previously indicated, the question of permissive use in no way affected the outcome of the initial tort action. Whether or not Murphy had permission in no way relieved Cincinnati of its duty to defend him in the initial suit. Had Cincinnati believed that Murphy was not within the scope of coverage, Cincinnati could have defended under reservation of rights and subsequently litigated the issue of coverage or filed for declaration of rights at the first instance. Cincinnati did not pursue these options, but refused to provide any defense for Murphy. We conclude that Cincinnati thereby breached a covenant in its policy contract and is therefore estopped from now litigating the issue of coverage.

For the foregoing reasons, the judgment of the Fayette Circuit Court is reversed, and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

ATTORNEY FOR APPELLANTS:
Buddy R. Salyer
151 East main Street
Morehead, KY 40351

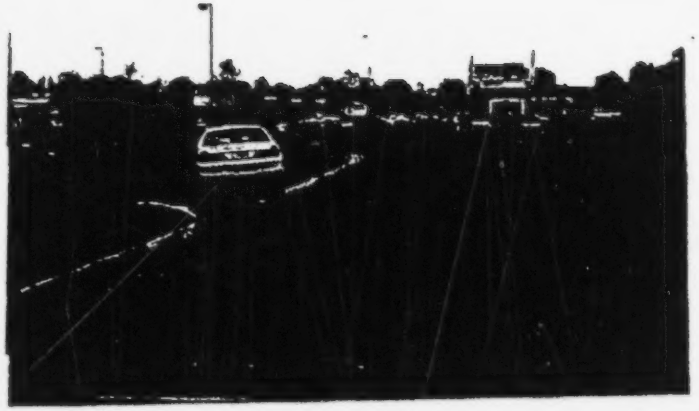
ATTORNEY FOR APPELLEES:
Thomas M. Cooper
Landrum, Shouse & Patterson
200 Security Trust Building
Lexington, KY 40507

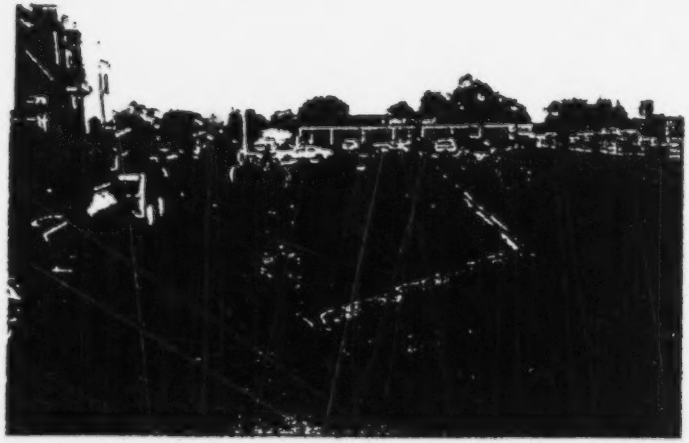
APPENDIX J

See Fold-Out Exhibit

Color Photograph Exhibit B

Exhibit B





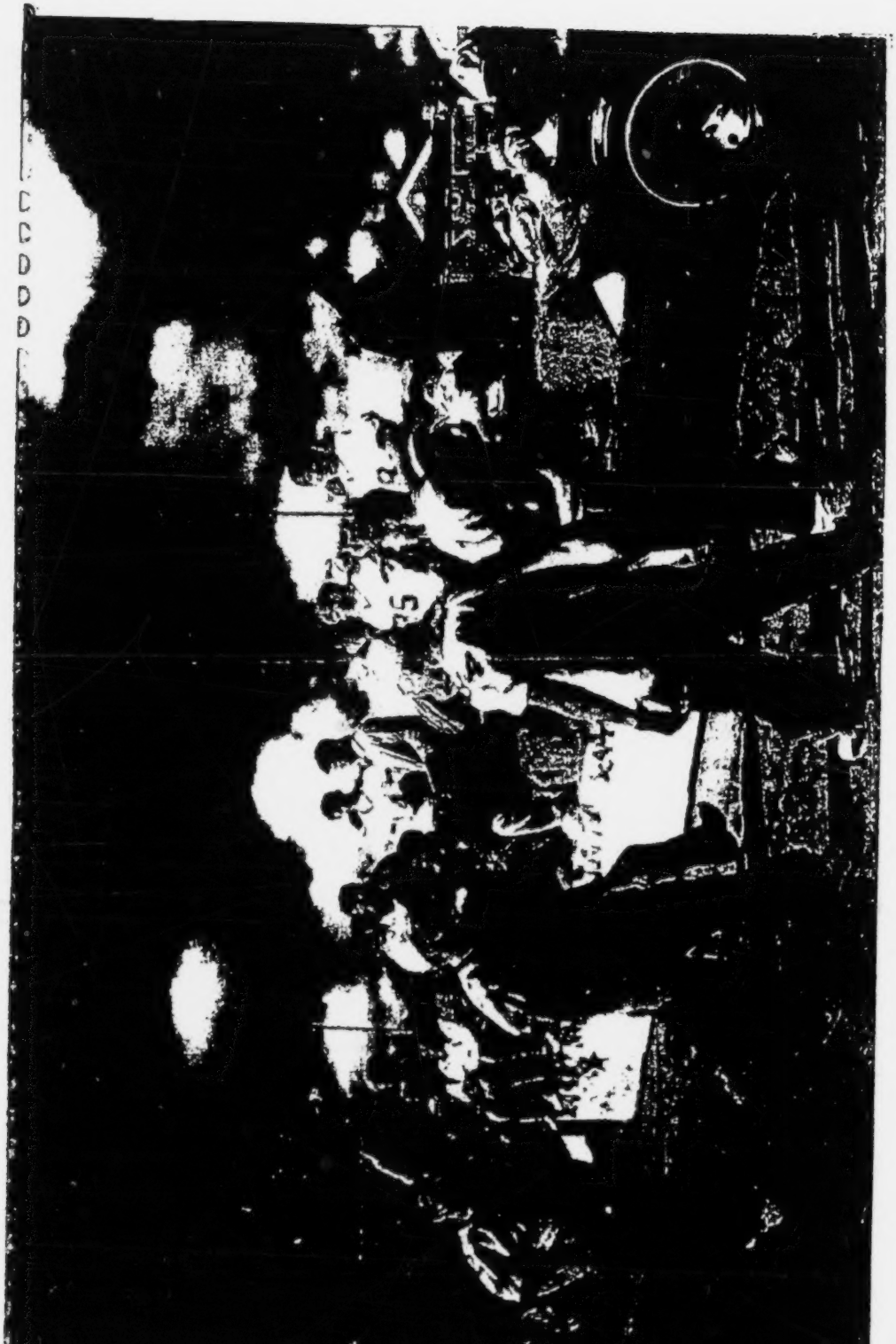
Set #2

APPENDIX K

See Fold-Out Exhibit

Color Photograph Exhibit 10

Exhibit 10



APPENDIX L

Western Heritage Insurance Company

ATTACHED TO AND FORMING A PART OF POLICY NUMBER: SCP0395479

EFFECTIVE DATE (12:01 A.M. STANDARD TIME): 08/29/2001

NAMED INSURED: JESSAMINE COUNTY CHAMBER

AGENT NO.: 1601

COMMERCIAL GENERAL LIABILITY COVERAGE PART DECLARATIONS

LIMITS OF INSURANCE

Each Occurrence Limit:	$ 1,000,000	
Damage to Premises Rented To You Limit:	$100,000	Any One Premises
Medical Expense Limit:	$5,000	Any One Person
Personal &Advertising Injury Limit:	$1,000,000	Any One Person or Organization
General Aggregate Limit:	$2,000,000	
Products/Completed Operations Aggregate Limit:	$1,000,000	

Locations(s) (including Zip Code) of All Premises you Own, Rent or Occupy (Enter "Same" if same location as your mailing address): SAME

PREMIUM

Classification	Code Number	Premium Basis
CLUBS-BUILDINGS	41668	2,500 (a)
OWNED OR LEASED	43421	40,000 (o)
		TOTAL

(a) Area
(b) Payroll
(s) Gross Sales
(o) Other (Define)

Rate		Advanced Premium	
Prem/Ops	Prod/Comp Ops	Prem/Ops	Prod/Comp Ops
278.662	INCLUDED	697	INCLUDED
.058	INCLUDED	2,300	INCLUDED

1. Per $100
2. Other (Define)

Total Advance Premium $2,997

THESE DECLARATIONS AND THE COMMON POLICY DECLARATION, IF APPLICABLE, TOGETHER WITH THE COMMON POLICY CONDITIONS, COVERAGE FORM(S), FORMS AND ENDORSEMENTS COMPLETE THE ABOVE NUMBERED POLICY.

All other Terms and Conditions of this Policy remain unchanged.

COMMERCIAL GENERAL LIABILITY
CG 00 01 07 98

[pg. 1]

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing the insurance.

The word "insured" means any person or organization qualifying as such under Section II - Who is An Insured.

Other words and phrases that appeal in quotation marks have special meaning. Refer to Section V - Definitions.

SECTION I - COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance

applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III - Limits Of Insurance; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgements or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages A and B.

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and

(2) The "bodily injury" or "property damage" occurs during this policy period.

c. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of

services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the Insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purpose of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

[pg. 10]

When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under

this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

5. Premium Audit

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period. Audit premiums are due and payable on notice to the first Named Insured. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

7. Separation of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in the Coverage Part to the first Named Insured, this insurance applies.

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V - DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose or attracting customers or supporters.

2. "Auto" means a land motor vehicle, trailer or semi-trailer designed for travel on public roads, including any attached machinery or equipment. But "auto" does not include "mobile equipment".

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

   a. The United States of America (including its territories and possessions), Puerto Rico and Canada;

   b. International waters or airspace, provided the injury or damage does not occur in the course of travel or transportation to or from any place not included in a. above; or

   c. All parts of the world if:

      (1) The injury or damage arises out of:

         (a) Goods or products made or sold by you in the territory described in a. above; or

(b) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; and

(2) The insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in a. above or in a settlement we agree to.

5. "Employee" includes a "leased worker", "Employee" does not include a "temporary worker".

6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.

7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or '

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

a. The repair, replacement, adjustment or removal of "your product" or "your work"; or

b. Your fulfilling the terms of the contract or agreement.

9. "Insured contract" means:

a. A contract for a lease of premises. However that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

b. A sidetrack agreement;

c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

e. An elevator maintenance agreement;

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

(1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;

(2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

(a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

(b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased orker" does not include a "temporary worker".

11. "Loading or unloading" means the handling of property:

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";

b. While it is in or on an aircraft, watercraft or "auto"; or

Western Heritage Insurance Company

ATTACHED TO AND FORMING A PART OF POLICY NUMBER: SCP0395479

ENDORSEMENT EFFECTIVE DATE (12:01 A.M. STANDARD TIME): 08/29/2001

NAME INSURED: JESSAMINE COUNTY CHAMBER

AGENT NO.: 1601

(The above information is required only when this endorsement is issued subsequent to preparation of the policy.)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PARTICIPANTS EXCLUSION

Such insurance as is provided by this policy does not apply to, and the Company shall have no duty to defend any action brought to recover damages because of:

A. "Bodily injury" or "personal and advertising injury" to any person while practicing for or participating in any contest, demonstration, event, exhibition, race or show.

As used in this provision any person shall include by not be limited to participants, attendants, mechanics, stewards, timing officials, announcers, corner men, musicians, singers, animal handlers, officials or any other person employed by or doing volunteer work for the named insured.

B. "Property damage" to any property of persons described in A. above including but not limited to any "auto", "mobile equipment", animal or any other property of the aforementioned persons.

All other Terms and Conditions of this Policy remain unchanged.

APPENDIX M

COMMONWEALTH OF KENTUCKY
13th JUDICIAL CIRCUIT
JESSAMINE CIRCUIT COURT

CIVIL ACTION NO. 02-CI-00623

[Filed September 16, 2003]

THE ESTATE OF LESLIE HARRISON CLEM, JR. by and through its duly appointed administrator, LESLIE HARRISON CLEM. SR.; LESLIE HARRISON CLEM, SR. and JANET CLEM, each individually and in their own Right PLAINTIFFS	)
VS.	)
GLENN HENSLEY, d/b/a/GLENN HENSLEY TRUCKING (U.S.D.O.T. number 198541), C.M.C,, INC., a Kentucky Corporation (U.S.D.O.T. number 304471); WES JOHNSON, Individually and JESSAMINE COUNTY CHAMBER OF COMMERCE, INC, a Kentucky Corporation DEPENDANTS	)

AGREED ORDER DISMISSING AS SETTLED WITH PREJUDICE

This matter being before the Court upon agreement of the Plaintiffs and the Defendant, Jessamine County Chamber of Commerce, Inc., and it appearing to the Court that the Plaintiffs and said Defendant have reached a full and final confidential settlement of any and all claims between them, and the Court having reviewed the file, and being otherwise sufficiently advised,

IT IS THEREFORE ORDERED AND ADJUDGED, that the patties' settlement agreement is noted, and that subject to and in accordance with the terms of that settlement agreement, all claims asserted against the Defendant, Jessamine County Chamber of Commerce, Inc. be and hereby are DISMISSED, WITH PREJUDICE, with the Plaintiffs and the Defendant, Jessamine County Chamber of Commerce, Inc. to bear their own costs.

DATED this 16th day of September, 2003.

/s/
JUDGE, HUNTER DAUGHERTY

HAVE SEEN AND AGREED:

COUNSEL FOR THE PLAINTIFFS

/s/
SAMUEL E. DAVIES, ESQ.

/s/
MAX D. PICKLESIMER, ESQ.

/s/
HOWARD O. MANN, ESQ.

COUNSEL FOR THE DEFENDANT,
JESSAMINE COUNTY CHAMBER OF COMMERCE, INC.

/s/_____
BARRY MILLER, ESQ.

APPENDIX N

JESSAMINE JAMBOREE PARADE ENTRY FORM
SATURDAY - OCTOBER 6, 2001 - 10:00.A.M.

THEME:JAMBOREE 2001 - SHINE!
JESSAMINE SHINE!

Name of Organization or Citizen
West Jessamine High School Football team and Cheerleaders
Address 221 Fairway West
Nich. KY 40356
Describe Float or
Entry Colt Pride - Cheerleaders will cheer throughout parade & will perform a cheer in center of town

RELEASE OF RESPONSIBILITY: IN CONSIDERATION OF THE ACCEPTANCE OF MY ENTRY IN THE JESSAMINE JAMBOREE PARADE, I, FOR MYSELF, MY EXECUTORS, ADMINISTRATORS, HEIRS AND ASSIGNS, HEREBY RELEASE AND DISCHARGE ALL SPONSORS AND ASSOCIATES FOR ALL CLAIMS OF DAMAGE, DEMANDS, AND/OR ACTIONS WHATSOEVER IN ANY MANNER, ARISING OR GROWING OUT OF MY PARTICIPATION IN SAID EVENT. BY SIGNING THIS DOCUMENT I EXPRESSLY WAIVE MY RIGHT TO MAKE A CLAIM AGAINST THE JESSAMINE JAMBOREE, THE CITY OF NICHOLASVILLE OR THE CHAMBER OF COMMERCE DIRECTORS AND OFFICERS.

This year we are celebrating the
22nd Anniversary of the Jessamine Jamboree.

DATE 10/1/01 SIGNATURE Pamela Green
IF UNDER 18 YEARS OF AGE, BY: _____

Make this the best parade ever!

MARK YOUR CALENDAR
JAMBOREE 2002 - OCTOBER 4 AND 5

APPENDIX O

Fifth Amendment to the United States Constitution

Fifth Amendment - Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX P

KRS 304.14-440 Policies to be readable -- Factors to be considered.

(1) All insurance policies subject to the provisions of KRS 304.14-420 to 304.14-450 shall be written in language easily readable and understandable by a person of average intelligence and education.

(2) In determining whether a policy or contract is readable within the meaning of this section the executive director shall consider, at least, the following factors:
   (a) The simplicity of the sentence structure and the shortness of the sentences used;
   (b) The extent to which commonly used and understood words are employed;
   (c) The extent to which legal terms are avoided;
   (d) The extent to which references to other sections or provisions of the contract are minimized;
   (e) The extent to which definitional provisions are incorporated in the text of the policy or contract; and
   (f) Any additional factors relevant to the readability or understandability of an insurance policy or contract which the executive director may prescribe by regulation.

Effective: July 15, 1988

History: Created 1988 Ky. Acts ch. 225, sec. 14, effective July 15, 1988.

Legislative Research Commission Note (6/20/2005). 2005 Ky. Acts chs. 11, 85, 95, 97, 98, 99, 123, and 181

instruct the Reviser of Statutes to correct statutory references to agencies and officers whose names have been changed in 2005 legislation confirming the reorganization of the executive branch. Such a correction has been made in this section.

No. 06-737

IN THE

Supreme Court of the United States

The Estate of LESLIE HARRISON CLEM, JR., Deceased, by and through Administrator, LESLIE CLEM, SR., *et al.*,

Petitioners,

v.

WESTERN HERITAGE INSURANCE COMPANY, a foreign insurer,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

J. DALE GOLDEN
MICHAEL T. DAVIS
GOLDEN & WALTERS, PLLC
771 Corporate Drive
Suite 905
Lexington, Kentucky 40503
(859) 219-9090

THOMAS H. CROUCH
Counsel of Record
MEAGHER & GEER, P.L.L.P.
8800 North Gainey Center Drive
Suite 261
Scottsdale, Arizona 85258
(480) 607-9719

Attorneys for Respondent

RESTATED QUESTIONS PRESENTED

1. Where a liability insurance policy excluded coverage for injuries sustained by any person while participating in an event, exhibition, or show, did the policy provide coverage when a parade participant fell off a parade float and sustained fatal injuries?

   The district court answered "no" and the circuit court affirmed.

2. Under a liability insurance policy that provides coverage only if the insured was "legally obligated to pay" damages to a third party, was the "legally obligated to pay" requirement satisfied where the insured denied liability, the insured paid no money to the claimant, and the claimant released the insured?

   The district court and circuit court found it unnecessary to reach this issue, although it provided an additional ground for judgment in favor of respondent.

PARTIES TO THE PROCEEDINGS AND AFFILIATIONS

Western Heritage Insurance Company is a corporation wholly owned by Scottsdale Insurance Company, which in turn is a corporation wholly owned by Nationwide Mutual Insurance Company. Nationwide Mutual Insurance Company is not a publicly held company.

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Respondent Western Heritage Insurance Company respectfully requests that the Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below.

This action involves a claim for insurance coverage under a liability policy issued by respondent Western Heritage Insurance Company to the Jessamine County Chamber of Commerce, which is located in Kentucky. The issue simply involves the application of insurance contract language to a particular set of undisputed facts. This matter is governed by Kentucky law. It does not involve a federal question. Nor does it involve a constitutional issue. And the decision below does not conflict with the decision of any other circuit court or the highest court of any state. In short, nothing about this case meets the criteria for review by this Court, set forth in Sup. Ct. R. 10.

This action arises from a tragic accident that caused the death of a participant in a parade. The participant, 15-year-old Leslie H. Clem, Jr., fell from a trailer that was being used as a float. His high school's football team and cheerleading squad were riding on the float in a community parade sponsored by the Jessamine County Chamber of Commerce.

A wrongful-death action was commenced against the Chamber of Commerce and other defendants, including the team's coach, the owner of the trailer, and the owner/operator

of the tractor. Although the Chamber had not supplied the trailer, the tractor, or the driver, and although it did not exercise any control over the float, the plaintiffs claimed that the Chamber was negligent and therefore liable. The Chamber vigorously denied liability.

Western Heritage insured the Chamber under a general liability insurance policy. But the policy had a "participant exclusion," which precluded coverage for bodily injury to any person while "participating in any contest, demonstration, event, exhibition, race or show." Western Heritage concluded that this exclusion precluded coverage for the wrongful-death lawsuit. After Western Heritage so advised the Chamber, the plaintiffs entered a $6,000,000 settlement with the Chamber. The settlement did not require the Chamber to pay anything to plaintiffs and did not call for entry of judgment against the Chamber. In fact, the settlement included a release, thereby precluding any such judgment. It also stated that the settlement was not an admission of liability, and that the Chamber denied liability. In exchange, the Chamber simply assigned to the plaintiffs whatever claims it had against Western Heritage.

The plaintiffs then filed this lawsuit against Western Heritage, contending that its policy covered the wrongful-death claim and that it was obligated to pay the $6,000,000 settlement.[1] Western Heritage moved for summary judgment on the ground that the participant exclusion precluded coverage. It also argued that the settlement agreement did not establish the insured's legal liability as required by the

1. The suit was originally filed in state court. Western Heritage removed the suit to the United States District Court for the Eastern District of Kentucky under 28 U.S.C. §§ 1441 and 1446, based on diversity of citizenship, 28 U.S.C. § 1332.

policy; thus, there was no basis for requiring Western Heritage to pay plaintiffs $6,000,000.[2]

The district court ruled that the policy precluded coverage for Clem's injuries because he sustained those injuries while participating in an event. (Petitioners' Appendix at 37a) The court therefore ordered summary judgment for Western Heritage, and dismissed plaintiffs' claims. (Petitioners' App. 39a) The court found it unnecessary to address the argument regarding the absence of the insured's legal liability. On appeal, the Court of Appeals for the Sixth Circuit affirmed. (Petitioners' App. 3a) The circuit court likewise ruled that the Participant Exclusion applied, and it was unnecessary to address the alternative ground relating to whether the settlement agreement satisfied the policy's "legally obligated to pay" requirement. (Petitioners' App. 16a)

---

2. The liability insurance policy covers only those sums the insured is legally obligated to pay because of covered damages. This "legally obligated to pay" requirement is set forth in the policy's insuring agreement. If the insured has no legal obligation to pay, the insuring agreement does not apply. Such legal liability is a prerequisite to coverage. In this case, no judgment establishing the Chamber's legal liability was ever entered and the settlement did not require the Chamber to pay any sums. Moreover, the settlement released the Chamber from all liability, and acknowledged that the Chamber denied liability. Under these circumstances, no coverage obligation existed because the insured had no legal liability. The insured was not obligated to pay anything. This provided an additional reason why the claim against Western Heritage in this action failed as a matter of law. But the lower courts found it unnecessary to address this ground, because they determined that the Participant Exclusion unambiguously applied.

II. Factual Background.

Western Heritage issued insurance policy number SCP0395479 to the Jessamine County Chamber of Commerce. (Petitioners' App. 69a) The policy provided general liability insurance coverage with a $1,000,000 per-occurrence limit. The policy's insuring agreement stated in part:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. * * *

(Petitioners' App. 71a-72a) The policy also contained various exclusions and endorsements that identified certain bodily injury or property damage to which the insurance did not apply. In particular, it contained the following endorsement:

THIS ENDORSEMENT CHANGES THE POLICY.
PLEASE READ IT CAREFULLY.

PARTICIPANT EXCLUSION

> Such insurance as is provided by this policy does not apply to, and the Company shall have no duty to defend any action brought to recover damages because of:
>
> A. "Bodily injury" or "personal and advertising injury" to any person while practicing for or participating in any contest, demonstration, event, exhibition, race or show.

> As used in this provision any person shall include but not be limited to participants, attendants, mechanics, stewards, timing officials, announcers, corner men, musicians, singers, animal handlers, officials or any other person employed by or doing volunteer work for the named insured.
>
> B. "Property damage" to any property of persons described in A. above including but not limited to any "auto", "mobile equipment", animal or any other property of the aforementioned persons.

(Petitioners' App. 82a-83a)

The Chamber sponsored an event known as the Jessamine Jamboree during the week of October 1-7, 2001. (Petitioners' App. 47a) One attraction for this annual event was the "Parade on Main", which occurred on October 6, 2001, in Nicholasville, Kentucky. (Petitioners' App. 47a) The designated parade route for spectators began in front of a McDonald's restaurant on North Main Street and ended in front of a Kroger's grocery store on South Main Street. (Petitioners' App. 47a-48a) The Chamber published advertisements with maps directing spectators to the parade route and other attractions. (Petitioners' App. 50a)

To participate in the parade, an entry form had to be submitted to the Chamber. A local high school football team and cheerleading squad decided to participate in the parade and thus submitted its entry form. (Petitioners' App. 87a) The form included a "release of responsibility" clause, thus indicating that the Chamber was not undertaking any

particular duties with respect to the participant's own float. (*Id.*)

The coach of the football team, Wes Johnson, allegedly told the team that participation in the parade was mandatory. (APX 194)[3] Leslie H. Clem, Jr., was on the team and participated in the parade. His mother, Janet Clem, was one of two adults who also rode on the float. Another parent, Pamela Green, took the lead in obtaining the tractor-trailer unit that was used as the float. (APX 195-197) Glenn Hensley provided his tractor and was also the float's driver. C.M.C., Inc. provided a "lowboy" trailer. (APX 154-55) Both Hensley and C.M.C. operated as common carriers in interstate commerce. (APX 154)

In prior years, the high school had entered a float in this parade. On past occasions, they had used the McDonald's parking lot as the staging area. But at the October 2001 parade, they assembled in the Winn Dixie parking lot. (APX 201) After the players, cheerleaders, and adults boarded the float, it pulled out onto Main Street. The float made no turns until it reached Kimberly Drive. (APX 202-03) Janet Clem testified that in past years they disembarked at Kroger's, but this had caused the parade to back up. Thus, if they were not permitted to disembark at Kroger's, they would return to Winn Dixie. (APX 212-13)

According to the other adult participant, Sherry Utley, the ride on the float was very "jerky." She indicated that the float periodically stopped. When it started again, it jerked and caused kids to fall. According to Ms. Utley, this occurred

3. References to "APX" are to the Joint Appendix provided to the circuit court. Respondent will gladly provide the Joint Appendix to the Court if it so desires.

along the whole route. (APX 248) At the end of the designated parade route, the float turned onto Kimberly Drive. After traveling a short distance on Kimberly, perhaps 150 feet, there was another instance where the float started with a jerk, causing some participants to fall. (APX 210; APX 251-52)

Sadly, on that particular occasion, Leslie Clem's foot became entangled in the wheels and he was pulled under the trailer. When the float stopped, he was pinned beneath the wheels. Many witnesses provided statements immediately after the accident. The police report summarized them as follows:

> Operator of [the float] stated he was westbound on Kimberly Dr pulling a trailer which was being used as a float during the Jessamine Jamboree. He said he was going between 01 05 miles per hour when he felt something under this trailer. As he looked he saw the victim and stopped.
>
> Witness statements said the victim had his foot on the trailer tire and as the vehicle moved the trailer gave a sudden jerk causing the victims foot to fall between the trailer wheel well and the tire pulling the victim thru the tire and trailer wheel well. Witnesses stated tried to pull his foot and leg free but could not. Trailer was open wheel trailer.

(APX 214) The supplemental report stated:

> (1) witness states [float] was slowing and it kind of jerked and then saw victim fall between the tire and wheel well of trailer. Other witnesses

> report [float] was slow moving and victim's foot was observed on the tire and others report victim playing with the tire and his foot got caught causing him to be pulled between the tire and wheel well and that truck then stopping abruptly with the trailer coming to rest on the victim's leg.

(APX 217) Unfortunately, Leslie Clem died a few hours later.

A wrongful death lawsuit was commenced against Glenn Hensley, C.M.C., Inc., Wes Johnson, and the Chamber. (APX 153) The complaint alleged that Wes Johnson, as a teacher and head football coach, had assumed responsibility to supervise the team during the parade. It alleged that he had a duty to investigate the safety of the float. (APX 155-56) The complaint alleged that C.M.C. had duties of care in providing the trailer for use as a float. (*Id.*) It alleged that Hensley had a duty to operate his tractor in a manner reasonably prudent for the protection of persons being transported on the trailer. (*Id.*) It also alleged that the Chamber had duties to promulgate safety standards, reject non-complying floats, monitor floats during the parade for safety, and terminate those that were operated otherwise. (*Id.*)

The complaint then alleged facts relating to the accident. It alleged that as the float proceeded on Kimberly, Clem fell and was pulled underneath the exposed tires. And it alleged that as a result of the accident, he sustained injuries that were fatal. (APX 157) The complaint then alleged that defendants' negligence was a substantial factor in the injuries and death.

Western Heritage advised the Chamber that its policy did not cover this lawsuit because Clem's injuries fell within the participant exclusion. After defending for some time, the

Chamber entered a settlement agreement with the plaintiffs. (Petitioners' App. 41a) The stated settlement amount totaled $6,000,000. (Petitioners' App. 42a) But the agreement did not require that the Chamber actually pay anything. It stated that "no attempt shall be undertaken by [plaintiffs] toward collection of the settlement amount above-mentioned from the [Chamber]." (*Id.*)

The Chamber assigned to plaintiffs "any and all claims and rights of recourse which it may have against any liability carrier by which it was insured on the date of the occurrence * * *." (Petitioners' App. 42a-43a) Plaintiffs agreed that the Chamber was "fully released and discharged * * * from any obligation or liability respecting the occurrence aforementioned." (Petitioners' App. 44a) The agreement also recognized that the Chamber continued to deny liability:

> [N]othing hereunder shall be deemed or construed as an admission of liability on the part of the [Chamber], same being specifically denied.

(*Id.*) The plaintiffs further agreed to execute an "agreed order" dismissing all claims against the Chamber with prejudice. (*Id.*) It is undisputed that no judgment was taken against the Chamber. It is also undisputed that dismissal of the claims with prejudice precludes the possibility of the Chamber ever being legally obligated to pay any damages as a result of this accident.

REASONS FOR DENYING THE PETITION

I. The District Court and Circuit Court Properly Ruled That the Policy's "Participant Exclusion" Precluded Coverage.

Petitioners throw much rhetoric at the decisions below. They call them "colossal" errors. (Petition 13) They state that the decisions "could not possibly be any more incompatible with established authority." (Petition 14) And they describe the courts' finding that the applicable policy language is unambiguous as "mind-boggling." (Petition 19) But Petitioners' rhetoric itself could not be further from reality. The decisions of both the district court and circuit court are properly grounded in applicable Kentucky law. The decisions do not contradict any rule of contract interpretation, and they represent a proper application of the plain language of the insurance policy to a particular set of undisputed facts.

The policy's "Participant Exclusion" precludes coverage for bodily injury to any person while participating in an event. The Chamber sponsored an event known as the Jessamine Jamboree, which included a parade. While Leslie Clem, Jr., was riding on a float that was part of this parade, he sustained fatal injuries when he fell off the float. Under the exclusion's plain language, the policy did not cover Clem's injuries because he sustained them while participating in the event.

In reaching that conclusion, the district court and circuit court correctly followed Kentucky law. Under that law, the lower courts were required to apply the plain meaning of contract language as it was written. *Kentucky Association of Counties, All Lines Trust v. McClendon*, 157 S.W.3d 626

(Ky. 2005).[4] Although Kentucky law requires ambiguous language to be construed against the drafter, this rule of liberal construction in favor of the insured does not apply if there is no ambiguity. Moreover, Kentucky law prohibits a court from using a non-existent ambiguity to rule against an insurer. It also prohibits a court from enlarging coverage under the guise of construction. *Id.* at 630-33.[5]

The petitioners invited the lower courts to violate every one of these principles. But the courts rejected that invitation. They correctly ruled that the participant exclusion

4. The Kentucky Supreme Court in *McClendon* explained the general rules for interpreting insurance contracts under Kentucky law:

> Terms of insurance contracts * * * are to be interpreted according to the usage of the average man * * * in light of the prevailing rule that uncertainties and ambiguities must be resolved in favor of the insured. But this "rule of strict construction against an insurance company *certainly does not mean that every doubt must be resolved against it* and does not interfere with the rule that the policy *must receive a reasonable interpretation* consistent with * * * the plain meaning * * *."

157 S.W.3d at 630 (citations omitted) (emphasis added).

5. The Kentucky Supreme Court in *McClendon* explained:

> [W]here there is no ambiguity, the rule of liberal construction in favor of the insured is inapplicable. As it has been stated numerous times by the courts in this Commonwealth, courts cannot enlarge coverage or make new contracts under the guise of construction, but must determine the parties' responsibilities according to the contract terms.

157 S.W.2d at 633.

was unambiguous and plainly precluded coverage for Clem's injuries because they happened while he was still participating in the event. The circuit court rejected petitioners' strained efforts to create ambiguity where none existed. Consistent with Kentucky law, the circuit court properly refused to rewrite the participant exclusion so as to create coverage where none was intended under the policy's plain language.

The petitioners offered far-flung hypothetical situations that, according to them, demonstrated that the exclusion does not apply to a person who is "going to" or "coming from" an event. The problem, of course, was that the undisputed facts here are nothing like these hypothetical situations. Clem was not injured while he was traveling to or from the event. Instead, it is undisputed that, at the time of the accident, the float had just turned off of Main Street at the end of the designated route for spectators. Clem was then injured when his foot became entangled in the float's wheels while it was still in the process of traveling to the location where the participants would disembark.[6]

On *these* undisputed facts, Clem plainly sustained his injuries while participating in the event. As both of the lower courts determined, Clem's *participation* in the event had not ended merely because the accident happened at a location just past the end of the official parade route.[7] The float may

6. Petitioners' own expert stated in an affidavit that the distance from Main Street to the location of the accident was about 179 feet. (Petitioners' App. 51a-52a)

7. Petitioners confuse the ending point of the official parade route for spectators with the ending point of Clem's *participation* in the event. As the district court explained, these are two different things and Clem's *participation* in the event had not ended merely because the float passed by the end of the parade route:

have passed by the end point for the spectators, but Clem's participation in the event did not end until he and the other participants had the opportunity to disembark from the float. The accident happened only about 150 feet past the end point for the parade route, and before the participants had an opportunity to exit the float. On these facts, Clem sustained his injuries while participating in the event.[8]

(Cont'd)

> [P]laintiff's interpretation requires the Court to read additional terms into the Participant Exclusion. The exclusion does not read that it applies only if a person is injured 'while participating in *the officially-designated portion* of any contest, demonstration, event, exhibition, race or show.' The court considers the plaintiffs' interpretation too narrow, focusing on the arbitrary point at which the official parade route ends, as opposed to when *Clem's participation* in the parade ended.

(Petitioners' App. 35a) (italics original).

8. The circuit court explained its reasoning as follows:

> [Plaintiff] strenuously argues that the decedent was no longer participating in the parade because the float had left the parade's official route by the time of the accident. We do not agree. Whether a float could travel beyond some outer boundary so that its riders would no longer be participating in the parade by their lack of proximity to the parade route would require us to engage in needless speculation. It is unquestioned that the float in this case had just left the parade's viewing terminus, had traveled only about 150 feet further, and had not yet provided its riders with any opportunity to debark. Whatever the possible merits of this argument on other facts, no reasonable trier of fact could find that traveling 150 feet with no opportunity to debark constitutes exiting the parade's zone of participation.

(Petitioners' App. 15a-16a)

The lower courts correctly rejected petitioners' argument as being an unreasonable interpretation that was inconsistent with the policy's plain language and inconsistent with the undisputed facts. This was entirely consistent with the rules of contract interpretation announced by the Kentucky Supreme Court. Thus, the lower courts did not deviate from applicable state law.[9]

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9. Contrary to Petitioners' suggestion, the decision below is not somehow in conflict with the decisions of other courts that have addressed similar exclusions. Petitioners refer specifically to *Glenn Falls Group Ins. Co. v. Simpson*, 439 S.W.2d 292 (Ark. 1969), and *Town of Surfside v. Morrison Assurance Co.*, 394 So.2d 530 (Fla. Ct. App. 1981). These two cases simply represent situations where an exclusion did not apply based on the particular facts at issue.

In both cases, the policy excluded any person "participating in any physical training, sport, athletic activity, or contest." In *Simpson*, after a golf game was terminated by rain, several golfers headed off the course. One of them was standing under a tree when he was struck by lightning. The court ruled that the exclusion did not apply because the person was not participating in the sport at the time of his injury. Likewise, in *Town of Surfside*, after a softball game was over, a boy was injured outside the ballpark when attempting to retrieve a ball that was floating in some water. Apparently, the boy stood and hit his head on a bridge. The court found the exclusion inapplicable because the boy was plainly not participating in an athletic activity when he was injured. In each case, the injuries occurred after the injured person's participation in the sports had unquestionably ended.

If Clem, his teammates, and the cheerleaders had ridden the float to their final destination, Clem had exited the float, and *then* he sustained injury by something unrelated to his participation in the parade, petitioners' reliance on *Simpson* and *Town of Surfside* might be well placed. But that is not what happened here. His participation in the event directly involved riding the float, and that

(Cont'd)

Petitioners have been grossly unfair in their characterizations of the lower courts' decisions. Rather than being "colossal" errors, the lower courts' decisions properly followed applicable state law as announced by Kentucky's highest court, they properly employed logical reasoning, and they properly recited the undisputed facts upon which their decisions were based. Nothing about the decisions warrants the exercise of this Court's supervisory powers.

II. Petitioners' Due Process Contention is Without Merit.

Petitioners contend that this case presents the same due process considerations that warranted this Court's review in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). But that contention can be quickly rejected even under a cursory review of *Campbell*. This Court granted review in *Campbell* to address whether a $145 million punitive-damage award could withstand scrutiny under the Due Process Clause and the Fourteenth Amendment. The Court noted that the Due Process Clause affords protection in such cases because "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 417. Also applicable in *Campbell* was the principle that "to the extent [a punitive damage] award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.*

(Cont'd)

participation had not ended when he sustained his injury. Moreover, the injury-causing instrumentality was, indeed, the parade float itself. The *Simpson* and *Town of Surfside* cases serve only to confirm that the participant exclusion applies under the undisputed facts of this case.

The due process considerations in *Campbell* have no application whatsoever here. There is nothing analogous between this case and *Campbell*. The present case does not involve punishment. Nor does it implicate a State's arbitrary deprivation of property. Moreover, unlike the question concerning review of punitive-damage awards under the Due Process clause, this case does not present any issue that is susceptible to repetition until addressed by this Court.

The only similarity between this case and *Campbell* is that the dispute in each case had its origins in an insurance contract. After that, the similarity ends. Indeed, while petitioners cite *Campbell* as support for granting review in this case, they make no real effort to articulate an actual due-process issue. Instead, petitioners' due process contention boils down to the assertion that the lower courts' decisions were wrong. The only "process" that petitioners claim to have been deprived of was "a proper application of controlling law to the facts presented." (*See* Petition 28) Such an argument utterly fails to present a violation of the Due Process Clause.

Petitioners had a full and fair opportunity to present all of their arguments, all of their authorities, and all of their evidence. They took full advantage of that opportunity in both the district court and the circuit court. There was plainly no due process violation. *See Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

CONCLUSION

Respondent Western Heritage respectfully asks this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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FILED
JAN 0 9 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-737

In the

Supreme Court of the United States

THE ESTATE OF LESLIE HARRISON CLEM, JR.,
Deceased, by and through Administrator,
Leslie Clem, Sr., et al.,

Petitioners,

v.

WESTERN HERITAGE INSURANCE COMPANY,
a foreign insurer,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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394 So.2nd 530 (Fla.Ct.App. 1981) 1

Twin Cities Fire Ins. Co. vs. Delaware Racing Ass'n.
848 A.2nd 624 (Del. 2003) 1

Having read Western's response, we find it difficult to imagine an alternative means (save, of course, a direct admission) by which the insurer could have more clearly confirmed the error below. Indeed, the lack of substance to its response is evident not only in its limited text, but in what is conspicuously absent therefrom, as well. We'll be direct in our reply.

First. Throughout these proceedings, we've asserted that which is fundamental and reflected in the authorities cited: that just as *ordinary* usage recognizes a clear distinction between "*participating in*" an event or activity and merely "*traveling to or from*" it, the former is also ordinarily understood as **ending,** at *least,* when (or where), one has fully exited the identifiable, prescribed boundaries of that event; is merely traveling elsewhere (by whatever means); and with no intention to return. *Nowhere* in the text of Western's brief does the insurer attempt to dispute this, much less offer authority in support.[1]

---

[1] Indeed, Western's anemic efforts to distinguish *Glenn Falls vs. Simpson*, 439 S.W.2d 292 (Ark. 1969) and *Town of Surfside vs. Morrison*, 394 So.2nd 530 (Fla.Ct.App. 1981) reveal only a mistaken understanding or refusal to concede the obvious. Again, the departure of the softball player from the field of play in *Morrison* (and with no intention to return and resume a game already concluded) denoted the end of his participation in the contest in question. Likewise, the ruling in *Simpson*, and rendered respecting an injury which at least occurred *within* the boundaries of the golf course, would have obviously been duplicated had those same injuries been sustained after the victim had exited those boundaries (again, with no intention to return) and by *whatever* means. By the same token, just as the ruling in *Twin Cities Fire Ins. Co. vs. Delaware Racing Ass'n.* 848 A.2nd 624 (Del. 2003),

Second. We've likewise urged that which is equally clear from the text of Western's policy and also confirmed in the various authorities cited: that *just as* the insurer's subject exclusion provides it with **uniform** protection respecting *any* injury sustained (by *whatever* means) while "participating in" *any* event, show, contest or the like, this *also* leaves its coverage obligations, extended under its broad insuring clause and respecting *any* injury sustained while merely traveling "to or from" *any* such event, equally and uniformly *unimpaired*. Again, this Court will find *nothing* in Western's offering (much less supporting authority) to the contrary.

Third. Finally, we've merely asserted that which is mandated by the foregoing principles and, again, fully supported by the authorities cited: that accepted rules of construction require Western's exclusion to be construed in a manner which comports with ordinary usage; is amenable to a *consistent* application to the various circumstances to which it is generally addressed (without producing the absurd); *and*, even should those terms be susceptible to a second, *alternative* reading, as well, they are to be construed in a manner most favorable to the insured. *This* (among *other* things), requires event boundaries (*and* mere travel therefrom, with no intent to return) to be accorded equal significance, whether the event is a race, exhibition *or* parade. Further, it is thus *utterly beside the point* if Western (and the Courts

---

extends to injuries sustained by a groom riding a racehorse to the barn and following the conclusion of a horse race in which the latter had competed, the *same* result would also obtain in the latter instance if those same, limited duties were instead being performed by the jockey who had also ridden the horse *during* the race. The point, very simply, is that mere similarity and temporal proximity between "participating *in*" and "traveling *from*" an event does *not* transform the latter into the former, and for purposes of a participant exclusion to be narrowly construed.

below) have enunciated what they insist is an alternative, but *broader*, construction of the exclusion, much less one that is both unprecedented *and* facially incapable of consistent application.

To all of this, Western (understandably) offers no direct response, tendering only a personal endorsement of its proposed construction; a recitation of selected excerpts drawn from the opinions below, themselves; and, again, *no* authority endorsing the unprecedented construction in question. Conversely, *nowhere* does the insurer offer authority *or* argument controverting that which it seeks to ignore: the usage *ordinarily* given to the terms of its exclusion, enunciated three paragraphs hereinabove; endorsed by the Kentucky Courts; and underscored by the contrast between its *own* exclusion and that invoked in *American Casualty vs. Krieger*, 181 F.2nd 1113 (9th Cir. 1999). More particularly, *nowhere* does it identify either language in its policy *or* recognized authority which would permit its exclusion to be invoked *here*, but (as exhaustively illustrated by Petitioners, both here and below) remaining clearly *inapplicable* in any *other* comparable instance, i.e., where any *other* event participant is injured after fully exiting the prescribed and identifiable parameters of a given event; is merely traveling elsewhere; and with no intention to return. Indeed, Western's only offering in *this* regard is to deem (without explanation) *any* such parallel circumstance as "far flung".

As should be apparent, however, Western's use of this dismissive description does *not* hinge on whether the travel from the event covers only the distance to a nearby concession stand *or* to one's home, located miles away, any more than it depends on whether a different or *identical* event is involved, or whether the mode of travel, used both during and after the event, is automobile, bicycle or one's lower

extremities. According to Western, *all* such instances have been "flung" too "far". In truth, the *only* operating "principle" at work in Western's transparent efforts to prop up an application of its exclusion, in *this* instance, that would be patently *improper* in any *other* comparable circumstance, is one borrowed directly from "The Three Bears". That is (and according to Western) a nearby concession stand is "too close"; one's home is "too far"; but over a half a football field away, on a different street, open to public traffic and extending in an inconsistent direction, is "*just right*". Thus, what Western offers (both here and below), as a preferred substitute for established authority, *are the teachings of a fairy tale.*

In short, Western has offered *nothing* negating the obvious: that rules of construction require a *consistent* application of it's exclusion, and the construction adopted below is simply *incapable* of being so applied *without* producing the absurd.[2] Having accused *Petitioners* of

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[2] The flaw in Western's construction only becomes more apparent when one considersons the scenario where, say, the sweetheart of one of the students on board accepts an invitation, extended during the vehicle's brief, pre-accident stop on Kimberly Drive, to join the others on the trailer. Under the construction adopted below, one must either (1) classify this additional passenger as a "participant" in the event (even though he or she *hasn't traveled a single inch of the parade's prescribed route)*, or (2) endorse the equally absurd view that as the vehicle and its passengers travel further away from the parade terminus, the *others* on board continue to "participate in" the parade left behind, while the *additional* passenger does *not*, and while *all of them* traverse the same path by the same means. *This* again illustrates why mere similarity and temporal proximity cannot be used to transform "travel from" an event into "participation"therein, *as well as* the the absurdity that results from applying the selected construction in a *consistent* manner.

resorting to unsupported "rhetoric", it is *Western* which has offered only a small collection of unsupportable, omnibus proclamations. These, in part, consist of it's claim that the rulings below "followed applicable state law", but undercut by it's conspicuous *inability* to cite a single authority in support or in conflict with those cited by Petitioners. The balance (apart from those to be discussed in the following section below) is comprised of it's insistence that "logical reasoning" supports a selected construction both at odds with an ordinary understanding commonly recognized and endorsed by the Kentucky Courts, *and* patently incapable of the consistent application required by the very terms of the exclusion, itself. Again, Western's tortured efforts toward demonstrating the *absence* of patent error has only served (and with no surprise to us) to confirm its *presence*.

II

By way of a second, "restated" question, Western (again, understandably) endeavors to construct some *other* basis for the decisions below that might be sufficient. In a nutshell(Brief in Opposition, p 2 - 3, 9), the insurer insists that a broad "release" appearing in the antecedent settlement served to trigger one of the prohibitory clauses in its policy (one requiring a determination of its insured's "legal liability"). In ostensible support, Western provides a significantly edited recitation of this release, as demonstrating it's purported, expansive breadth.

Here, it would actually be sufficient to merely note two things: that just as Western failed to interpose "release" as an affirmative defense [as required under FRCP 8 (c)], its current offering fails to provide an *argument* in support of this additional, "restated" question. Beyond that, however, Western's recitation and expansive description of the

"release" language in question features and hinges on the same, unfortunate editing it employed for the same purpose in proceedings before the Sixth Circuit. *Appellees Brief, p. 9*. More completely stated (and with the language excised by Western being italicized for emphasis and identification), the relevant provision actually read, "*That except as to the various conditions and considerations specifically set forth herein*, [the Chamber] is hereby fully released and discharged... from any obligation or liability respecting the occurrence aforementioned." *Apx,p. 44 a*.

This, and other details, should place matters in proper perspective. Like virtually any other settlement (and, indeed, those commonly utilized by liability insurers), this instrument merely made it clear that the considerations being received in compromise were limited to those specifically enunciated therein, and accomplished this end by providing a release of any claim *beyond* that. Likewise (and, again, as is customary), the instrument recited language to the effect that its terms did not constitute an admission of liability by the settling defendant, this instead being denied. Conversely, *none* of this served to negate the considerations received from the Chamber and enunciated therein *or*, more specifically, foreclose enforcement of the monetary terms provided therein against the Chamber. This last, instead, was accomplished by an entirely appropriate "covenant not to enforce", and paired with an equally proper assignment of the Chamber's rights. See discussion, *Petition for Writ of Certiorari, p. 4 - 6, fn. 5, infra.*

Ultimately, then, Western's espoused "position" in this regard (insofar, that is, as this *can* be discerned in the absence of a supporting argument) reduces itself to both the absurd and the discredited: (1) that a material distinction is to be drawn between compromises drawn in "settlement" and

"agreed judgment" form, and (2) that an offending insurer can hide behind prohibitory clauses contained in its policy so as to effectively frustrate settlement by its wrongfully abandoned insured. The former of these two notions was specifically rejected in *Burgess vs. Willett,* 311 Ky.745, 225 SW 2nd 315 (1949), holding (not surprisingly) that an agreement drawn in "agreed judgment" form remains a settlement between the parties. As to the second of these propositions (that an insurer-in-breach may demand ongoing compliance with "after trial" and other prohibitory clauses contained in its policy), this, too, has been clearly rejected in *St. Louis Dressed Beef & Provision Co. vs. Maryland Casualty Co.*, 201 US 173 (1906), and, likewise, in both *Cincinnati Insurance Company vs. Vance*, 730 SW2nd 521 (Ky. 1987) and *Medical Protective Ins. Co. of Fort Wayne, Indiana vs. Davis*, 581 SW2nd 25 (Ky.App. 1978). As both of the latter decisions make clear, the defenses available in Kentucky to an insurer-in-breach, and respecting its liability regarding any "result" obtained in the underlying claim, are **not** composed of fraud, collusion, an absence of coverage **and** either a trial of the underlying merits *or* protection under prohibitory clauses contained in it's policy. Instead, these are explicitly limited to only the *first three* just mentioned, *two* of which (fraud and collusion) Western eschewed by way of its original and amended pleadings herein.

In short, insofar as Western's denial of coverage *was* in error (which *should* be beyond doubt), it *has* no further, viable defense to enforcement of the underlying agreement. As this necessarily implies, there is *also* no alternative basis upon which the decisions below may be sustained. In a larger sense, then, Western's "mistake" lies *not* in failing to present an argument in support of its corresponding, "restated" question, but in posing the latter (and based, again, on a distortion of the "release" provision in question).

III

We have no intention to further bandy words with Western concerning the similarities between the circumstances here and those deemed sufficient to merit review in *State Farm Mut. Auto. Ins. Co. vs. Campbell*, 538 US 408 (2003). Instead, we'll be direct.

Again (and notwithstanding Western's efforts to either reference *one* release never executed by or on behalf of the decedent, *or* expand *another* one contained in the underlying settlement), the material facts are undisputed. Likewise, the controlling law, as it pertains to the construction of Western's exclusion, is clear and well established as such in virtually every jurisdiction. Further (and, again, as in *Campbell*), the issue presented is "neither close nor difficult", and the error patent. Similarly, the impact of that error on those seeking relief has been significant, if not moreso. Finally, because that error concerns both a common policy provision *and* the application of principles widely prevailing, both the importance of the issue presented, to the insured public at large, and the potential of that error being repeated, are more than apparent.[3]

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[3] Western's bald insistence to the contrary, in this last regard, appears to be one properly translated into either (1) an unenforceable promise by this *particular* insurer (as opposed to the hundreds of others) that it has no intention of duplicating the erroneous denial of coverage visited upon the Jessamine County Chamber of Commerce, *or* (2) that it has no expectation that *another* court will be nearly as receptive to the flawed arguments it so successfully advanced below. Either way, this is strange support, indeed, for the proposition that the Petition presented should be *denied*.

In this context, there's also no difficulty in reducing Western's espoused position to its unadorned essentials. On the one hand, the insurer eagerly embraces the proposition that a grievous denial of due process occurs when (as in *Campbell*) a state law, constitutionally infirm in some other respect, is applied to the substantial detriment of a corporate insurer. Simultaneously, however, Western urges that no such blemish is to be found when (as *here*) a Court fails to apply *valid* state law, but does so to the significant detriment of an *insured* (and/or its assignees). In *those* instances, it urges, due process considerations become limited to those concerning "notice and opportunity for hearing". Inasmuch as no such distinction exists, Western's espoused position reduces itself to little more than the proposition that such injury, and the patent error producing it, are only worthy of this Court's attention when they operate to the detriment of such an insurer. This, clearly, hardly requires response.[4]

In any event, even we recognize that this Court's intervention must hinge on something more than the outcome of a debate focused merely on characterizing the nature of the

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[4] If this characterization seems unduly harsh, we only remind the Court of that which is made clear in the preceding pages: that Western's abortive efforts to bolster the *propriety* of the unprecedented rulings below, and offered (like the latter) in the absence of supportive authority, has only served to confirm the *opposite*. Accordingly, it's further pronouncements in the latter pages of it's brief represent merely an insistence that *it* should be permitted to *retain* the benefit of that error. By the same token, then, it's not inaccurate to say that *if* Western *is* inclined to "restate" the *real* issue presented, it might have done so with far greater clarity: "Whether the patent error below, to the benefit of this insurer, should be ignored and preserved?"

error below.[5] Conversely, however, mere pronouncements, exalting the "rule of law" as inviolate, mean nothing *unless* the mechanisms necessary to the preservation of such a principle remain within the reach of an aggrieved litigant. Plainly, where such an error occurs at the *Circuit* level, there *is* no avenue of relief therefrom, *except* by way of that which leads to *this* Court's doorstep.

CONCLUSION

Again, we request that the Petition in this matter be granted.

Respectfully submitted,

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[5] Western's predictable reliance on Sup.Ct. R.10 is misplaced. By the very terms of that rule, it's enunciated criteria, while important, stop short of being exhaustive. Very simply, it's provisions do *not* provide the Circuits with immunity respecting patent errors of *any* specie.